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Thick and Thin Concepts in Law

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PhD in Law

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March 2016

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Abstract.

The single aim of this thesis can be stated clearly: to argue for the use and usefulness of thick and thin concepts within law. The distinction between thick and thin concepts - recently popularized in analytic philosophy - has in the last two decades migrated from its point of origin in meta-ethics to other areas of philosophy and now law. My contention is that whilst use of the distinction within law is welcome, legal deployment of the distinction has been haphazard, with the idea left vague and ambiguous.

Although the lack of clarity within the legal literature could be explained by the infancy of these ideas within legal discourse, the imprecision and ambiguity that results has undermined the juristic value of the central distinction for law. In particular I note the lack of any attention at all within the legal literature to the question of whether normative and descriptive aspects of thick concepts are capable of being separated – even though this controversy has dominated the philosophical literature. However, my criticism of the legal deployment of thick and thin is not restricted to this idea alone. Failure to investigate (or mention) the several issues I identify has, I argue, seen opportunities missed for the gainful use of the distinction in law, with my thesis focusing, in illustration, on the value to be gained through such analysis in the areas of jurisprudence and legal education. I select these two areas because they ably demonstrate the opportunities that I contend exist, and also because their scope, from theoretical analysis to educational practice, serves notice that these insights might reasonably range over a wider field in law too.

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I would like to thank my research supervisors Dr Stephen Pethick and Dr Simon Kirchin for sharing their time and ideas with me in countless supervision meetings and for their valuable feedback during the drafting of this thesis. I would also like to thank Professor Joanne Conaghan and Professor John Fitzpatrick for their assistance during the early stages of this research project.

In addition to recognising the support I have received from the academic staff noted above, I also wish to extend my thanks to Lynn Risbridger Postgraduate office manager for the law school who has always not only been efficient but also helpful, friendly and most importantly understanding.

Finally I wish to thank my family particularly my parents Hilary and Brian, and my partner James for always providing emotional support and encouraging me to persevere with what often seemed like an insurmountable challenge.

Chapter One: Introduction

...justice, fairness, and impartiality, to take one cluster of notions; liberty, equality, freedom of expression to take another; privacy, self-respect, envy, to take a third; needs, well-being, and interests to take a fourth; and rights, autonomy, and consent for a fifth. Are the concepts on this list thick or thin?¹

This question, put by Samuel Scheffler in his review of Bernard Williams' coinage (in print) of the term 'thick' ethical concept, has only recently attracted attention from legal theory.² Despite the terms infancy, an increasing number of legal scholars are directing their research efforts towards enquiries concerning thick and thin concepts within law, and an even larger number are deploying these terms within their wider research with varying degrees of understanding and success (the least successful baldly attributing thickness or thinness to specific legal concepts without elucidating the reasons for such classification).³ This present thesis recognises the importance of these ideas within

¹ Samuel Scheffler, 'Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy' (1987) 96 (3) *The Philosophical Review* 411, 417

² The distinction between thick and thin concepts first arose in meta-ethics and Bernard Williams is attributed with the first coinage in print of the term thick ethical concept, see: Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge Classics, 2011)

For the first coinage in print of the distinction between thick and thin description, see: Gilbert Ryle, 'The Thinking of Thoughts: What is 'Le Penseur' Doing?' in *Collected Essays 1929-1968* (Routledge, 2009) The terms thick and thin have also been applied to ethical theories as a method of distinguishing between moral arguments based on their thickness or thinness (although this is not dealt with in this thesis), see: Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994)

³ The following list is not exhaustive, but these theorists are all writing on thick and thin concepts within the legal context (the articles are referenced within chapters five through eight). R. A. Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189; Bernard Williams, 'Afterword What Has Philosophy to Learn from Tort Law?' in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995); David Enoch and Kevin Toh, 'Legal as a Thick Concept' in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013); Heidi Li Feldman, 'Appellate Adjudication as Conceptual Engineering' in Graham Hubbs & Douglas Lind (eds), *Pragmatism, Law and Language* (Routledge, 2014); Heidi Li Feldman, 'The Distinctiveness of Appellate Adjudication' (2012) 5 *Washington University Jurisprudence Review* 61; Heidi Li Feldman, 'Blending Fields: Tort Law, Philosophy and Legal Theory' (1998) 49 *South Carolina Law Review* 167; Heidi Li Feldman, 'Objectivity in Legal Judgment' (1994) 92 (5) *Michigan Law Review* 1187; Henry Mather, 'Natural Law and Right Answers' (1993) 38 *American Journal of Jurisprudence* 297; Harvey Siegel, 'Is Education a Thick Epistemic Concept' (2008) 37 (3) *Philosophical Papers* 460; J. E. Penner, 'Legal reasoning and the authority of law' in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003); J. E. Penner, 'Common Law Cognition and Judicial Appointment' (2001) 38 *Alberta Law Review* 683; John Finnis, *Reason in Action: Collected Essays Volume I* (Cambridge University Press, 2011); John Finnis, 'A Response to Harel, Hope, and Schwartz' (2013) 8 *Jerusalem Review of Legal Studies* 147; Jose Juan Moreso, 'In defense of Inclusive Legal Positivism' in P Chiassoni (ed), *The Legal Ought Proceedings of the IVR Mid-Term Congress in Genoa 2000*, (Giappichelli, 2001); Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1992); Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001); Lawrence B. Solum & Linghao Wang, 'Confucian Virtue Jurisprudence' in Amalia Amaya & Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing, 2013); Mitchell N. Berman & Kevin Toh, 'Pluralistic Nonoriginalism and the Combinability Problem' (2013) 91 *Texas Law Review* 1739; R. A. Duff, 'Criminalizing Endangerment' (2005) 65 *Louisiana Law*

analysis and argues that ‘thick’ and ‘thin’ concepts offer a new way of approaching legal analysis, the potential benefits of which has so far gone relatively unnoticed within law due to the localised invocation of these ideas to many disparate topics within law. It is a major intended strength of my thesis that it not only recognises the importance of these ideas within analysis and the significance of this relatively new analytic tool for law, but that it also responds to the need for an overarching conspectus of thick and thin within law. My thesis is the first sustained attempt to provide a clearer picture of the current use of thick and thin within law and offers an extensive collation of the many disparate (but not all) legal uses of thickness and thinness, with particular emphasis placed upon thick concepts and thin concepts. Linking, comparing and contrasting the different uses of thickness in legal scholarship adds value to my thesis because it brings to attention the need to look across adjoining areas of legal scholarship to discover whether apparently similar uses of thickness are in fact all the same use of thickness, or in fact one of many different uses of thickness. An important aspect of my thesis is therefore to be found in my compendious footnotes as much of the excavation of the research literature and its interconnections and similarities to other work in the relevant subject areas, is contained in my footnotes.

One seminal theorist writing on thick concepts, Simon Kirchin, explains the recent interest in the distinction among philosophers by drawing attention to the following features of thick concepts:

They are practical concepts and everyday concepts. They are concepts that pull us – and others – in certain directions and justify some actions and not others. We can use them to shape our world and colour it in special ways. Thick concepts are important to us and our world because they seem to be a necessary way of understanding what the world and its people are. If we understand what these concepts are and how they work, we might better understand ourselves and the world we find ourselves in.⁴

It is these same features noted by Kirchin that support my argument for their use and usefulness within law (their relevance for law). My argument (after careful exploration

Review 941; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011); Simon Hope, ‘The Basic Goods and the “Lawlike” Use of Reason: Comments on *Human Rights and the Common Good*’ (2013) 8 *Jerusalem Review of Legal Studies* 136; and Toni M. Massaro, ‘Gay Rights, Thick and Thin’ (1996) 49 *Stanford Law Review* 45

⁴ Simon Kirchin ‘Introduction: Thick and Thin Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 18

of the current use of the distinction between thick and thin concepts) aims to elicit the potential this analytic tool carries for legal scholars, educators and practitioners in clarifying their subject and their endeavours within it, thereby demonstrating the usefulness of the distinction between thick and thin concepts for a wide spectrum of legal actors. This analytic tool is drawn from what is to many legal scholars an unfamiliar discipline: meta-ethics. It is therefore unsurprising in light of the relatively recent emergence of this analytic tool and its origin in an unfamiliar discipline, that the present legal understanding requires sharpening. Although the distinction and associated literature is understood only partially, inconsistently, or even mistakenly in contemporary legal scholarship, which places limits upon its current use within law, my thesis still successfully demonstrates the usefulness and potential significance (which in many ways remains untapped) of this distinction for many aspects of law.

Invocation of the distinction between thick and thin concepts (as I show in my earlier chapters) carries with it philosophical, metaphysical and ethical commitments which can be seen in the divisions amongst the philosophers who use these terms. These philosophical, metaphysical and ethical commitments also appear within the legal scholarship, although at present their occurrence may be inadvertent and haphazard. One of the values of my thesis is therefore the recognition of a pressing need to clearly understand the distinction and the commitments that it carries and the subsequent argument that you cannot (and shouldn't) invoke the distinction between thick and thin concepts in a slight or casual way. Whilst I take no stance within my thesis as to which version of the distinction ought to be adopted because such an argument would entail these philosophical, metaphysical and ethical commitments that are the cause of division within the source literature, I do advance a wider argument that legal theorists invoking the distinction between thick and thin concepts need first to understand that there are divisions within the source literature and second that those divisions are reflective of wider philosophical commitments. The main ambition of the present thesis is therefore to demonstrate the use and usefulness of thick and thin concepts within law, my thesis acknowledges that further research study and discussion is required to enhance the current level of legal understanding.

The distinction in question, between thick and thin concepts, is a philosophical distinction drawn from analytic philosophy, which is practiced chiefly by philosophers working within the United Kingdom, the United States, Australia, Canada and

elsewhere. It is therefore susceptible to the routine charges that are laid against analytic philosophy by legal practitioners, who challenge its relevance in resolving the practical legal matters that concern them. It is also susceptible to the critical attacks levied against analytic conceptual analysis within law, which views these modes of reasoning as out-dated.⁵ These attitudes may go some way to explaining its current under-appreciation within law. Nonetheless, this thesis will attempt to demonstrate both the relevance and importance of the distinction to matters that routinely form the subject matter of legal discussion, legal scholarship, legal education and legal practice; and so it therefore follows that successful demonstration of my thesis will also go part way in defending the role of analytic philosophy, particularly conceptual analysis, within law. These matters are, however, supplementary and any such defence is secondary to my primary aim - which is the articulation of the terms 'thick' concept and 'thin' concept, and a demonstration of the usefulness of this distinction (when properly understood), for law. What merit there is in my thesis is to be found in the success of my responses to these primary concerns, rather than in the supplementary matters that I turn to in passing.

The criteria that I will employ in determining *usefulness* are not particularly technical. My method will simply be to show the benefit found in the use of the distinction in relation to a series of persistent problems or standing concerns within the frame of legal theory, legal understanding and legal practice. In brief, and in advance advertisement of my claims, these benefits will include new and helpful ways of understanding existing difficulties and the generation of new and profitable avenues for research study and discussion, but also extend to the claim that awareness of the distinction creates the opportunity for a radical remodelling of how we understand law and come to build knowledge and expertise within legal practice.

Pursuing my thesis will require exegesis and explanation of the relevant source literature (analytic philosophy) to clarify the distinction in question, facilitate an assessment of its present deployment within the legal literature and to support my argument that these ideas currently have untapped potential of benefit for legal

⁵ The legal challenges are a reflection of similar challenges from within philosophy, which attack both analytic philosophy, and more specifically analytic conceptual analysis as modes of reasoning. That philosophy of law voices similar concerns to philosophy is hardly surprising, because as Brian Bix notes: 'issues within legal theory are often mere instantiations of more general problems and debates.' Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition 2012), 8

understanding. This argument is intended to have a wide scope in application to its target scholarship, and so to demonstrate the extended reach of my argument I attend to more than one area of law. This thesis is therefore pursued in relation to two related but distinct areas of law - philosophy of law (conceived broadly as jurisprudence or legal theory) and legal education - with the hope and intention that this range provides support for its wider scope within law, perhaps in relation to other more practical aspects of law (such as legislating), although these will not be pursued in this present work.

Sharpening the topic.

For purposes of clarity, I state again that my subject is a particular analytic tool – the distinction between thick and thin concepts – as understood by the analytic philosophical literature from which it recently emerged.⁶ The distinction between thick

⁶ The following is not an exhaustive list but it demonstrates the rise in popularity of the distinction within ethics, see: Allan Gibbard and Simon Blackburn, 'Morality and Thick Ethical Concepts' (1992) 66 *Proceedings of the Aristotelian Society*, 267; Allan Gibbard, *Wise Choice, Apt Feelings* (Clarendon Press, 1992); Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge Classics, 2011); Christine Tappolet, 'Through thick and thin: 'good' and its determinates' (2004) 58 (2) *Dialectica*, 207; Debbie Roberts, 'It's Evaluation only Thicker' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Edward Harcourt and Alan Thomas, 'Thick Concepts, Analysis, and Reductionism' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Eric Wiland, 'Williams on Thick Ethical Concepts and Reasons for Action' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, 2004); John McDowell, 'Critical Notice of Bernard Williams' *Ethics and the Limits of Philosophy*' (1986) 95 *Mind* 377; Jonathon Dancy, 'Practical Concepts' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Jonathon Dancy, 'In Defense of Thick Concepts' (1995) 20 (1) *Midwest Studies in Philosophy* 263; Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Matti Eklund, 'Evaluative Language and Evaluative Reality' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Michael Smith, 'On the Nature and Significance of the Distinction between Thick and Thin Ethical Concepts' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Nick Zangwill, 'Moral Metaphor and Thick Concepts: What Moral Philosophy Can Learn from Aesthetics' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Pekka Vayrynen, 'Thick Concepts and Variability' (2011) 11 (1) *Philosophers Imprint* 1; Pekka Vayrynen, *The Lewd, the Rude and the Nasty: A Study of Thick Concepts in Ethics* (Oxford University Press, 2013); Pekka Vayrynen, 'Essential Contestability and Evaluation' (2014) 92 *Australasian Journal of Philosophy* 471; Pekka Vayrynen, 'Shapelessness in Context' (2014) 48 *Nous* 573; Pekka Vayrynen 'Thick Concepts and Underdetermination' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Pekka Vayrynen, 'Thick Concepts: Where's Evaluation?' in R. Shafer-Landau *Oxford Studies in Metaethics volume 7* (Oxford University Press, 2012); Pekka Vayrynen, 'Objectionable Thick Concepts in Denials' (2009) 23 *Philosophical Perspectives* 439; Philippa Foot, 'Moral beliefs' (1958) 59 *Proceedings of the Aristotelian Society* 83; Philippa Foot, *Virtues and Vices* (Oxford University Press, 2002); Samuel Scheffler, 'Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy' (1987) *The Philosophical Review* 96; Simon Blackburn, 'Disentangling Disentangling' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Simon Kirchin, 'Thick Concepts and Thick Descriptions' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Timothy Chappell, 'There Are No Thin Concepts' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); T. M. Scanlon, 'Thickness and Theory' (2003) 100 (6) *The Journal of philosophy* 275; Valerie Tiberius, 'Well-being, Wisdom, and Thick Theorizing:

and thin concepts is best introduced by way of examples. Imagine a scenario where you are describing an individual (W) a witness in a criminal case as GOOD.⁷ It is likely that you are intending to convey that this person is ‘morally good’ as opposed to good at maths or cleaning. If your intention is to provide a character reference for W then good does not reveal much about W’s character as there are many ways in which people can be good. If you now continue to elaborate upon your initial description of W and add that they are HONEST and RELIABLE, then these additional descriptions provide a better sense of W’s goodness, (in this context, then, likely establishing the credibility of W more securely). Given typical linguistic conventions it is likely that it will be inferred from the description of W as HONEST and RELIABLE that these character traits warrant approval, because these more specific concepts – HONEST and RELIABLE – seem to be connected to approval (or disapproval) in some manner. In very bold outline, these more specific concepts may be taken, in virtue of their specificity, to be thicker than the more general attribution of good. In more detail thicker concepts are said to contain both evaluative conceptual content and descriptive conceptual content, whereas thin concepts are said to clearly contain evaluative content, but if they contain any descriptive content this is thought to be extremely limited.⁸

Alongside this distinction emerged different uses of ‘thick’ and ‘thin’, and different yet analogous terms.⁹ Although my thesis is not generally concerned with the elucidation of these other uses and analogous terms (even though they can be found within legal scholarship as well as analytic philosophy), it will be necessary for purposes of clarity to individuate the distinction that I will be working with from these other philosophical ideas, and this individuation will be most prominent within my critique of the legal literature where these philosophical ideas suffer from problems of ambiguity.

on the Division of labor between Moral Philosophy and positive Psychology’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013)

⁷ I follow the convention within meta-ethics that is used to distinguish between a concept and the associated term. Consider the example of honest, the concept is referred to in the following manner: HONEST, and the associated term is referred to in the following manner: ‘honest’.

⁸ As will be demonstrated by chapter three the above characterization of thick concepts and thin concepts is very crude and is only intended as a quick explanation of the main difference between these concepts. The above distinction is a basic overview of the orthodox position, but this is widely contested and there are many interesting aspects of these concepts that will be elaborated upon in both chapters three and four.

⁹ Susan Hurley used the terms centralism and non-centralism to discuss ideas similar to those conveyed by the distinction between thick and thin concepts, her work is discussed in chapter two. See: Susan Hurley, *Natural Reasons Personality and Polity* (Oxford University Press, 1992)

The core distinction between thick and thin concepts is one of many notions that seek to better understand concepts and conceptual meaning, which include, but are not limited too: matters of modality (i.e. of necessary and sufficient conditions); of properties and relations; of predication; of sense and reference; of transitivity and non-transitivity; and of symmetry and asymmetry. The distinction between thick and thin concepts is the most recent analytic tool and sits alongside other distinctions, such as the distinction between concepts and conceptions, and the distinction between kind and degree. Although these other analytic tools and aspects of analytic conceptual analysis have generated a wealth of literature that is often loaded with disagreements, a certain level of knowledge regarding analytic conceptual analysis will be assumed and this present enquiry will only attend to aspects of this supplementary literature when it bears materially on my thesis and the distinction with which my thesis is concerned.

The focus, then, is on a particular analytic tool – a distinction - and the objective is to consider how this distinction can help towards a better understanding of the concepts that we use, within the context of law; that is, in relation to legal concepts. The thesis at no point asserts that thickness or thinness are ontological features of language, meaning, or our form of life (even if they are). The resulting objective is narrow but has considerable significance: enabling the recasting and possible resolution of long-standing legal problems and disputes; offering the prospect of a better understanding of law; and assisting in the re-imagining of topics which fall under the concern of general jurisprudence. I aim to show that this distinction has current relevance: it can help to inform the present debates regarding the ambition and shape of legal education and impacts upon the legal service (it has implications for both legal professionals as service providers and their clients). I aim to show how the distinction carries significance for reviews such as the Legal Education and Training Review (LETR);¹⁰ and for the shape of the legal curriculum at British universities, which needs to reflect the dramatic legislative changes the legal system has recently undergone. The Legal Services Act 2007 (LSA)¹¹ and the Legal Aid, Sentencing and Punishment of Offenders

¹⁰ Work commenced on the LETR in May 2011 and the report was published in June 2013. The LETR was initiated by the Legal Services Board (LSB), which is a regulatory overseer in the legal sector created by the Legal Services Act 2007. The three main legal regulators – the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and ILEX Professional Standards – were responsible for managing the LETR and overseeing the team of researchers conducting the review.

¹¹ One of the important implications of the LSA 2007 was that it enacted provisions to enable law firms to become Alternative Business Structures in partnership with other occupations; this marks a change in the distinctiveness of both the legal profession and legal services.

Act 2012 (LASPO)¹² are currently transforming the legal landscape within England and Wales.¹³ These dramatic structural changes have impacted upon the ethos of the profession and legal education (the full impact of these changes is yet to be seen); and will in turn affect many different aspects of English Law. It is a strength of this thesis that the deployment of thick and thin concepts in law is both relevant and of use to the current legal climate and on-going transformation. By demonstrating the use and usefulness of thick and thin concepts in relation to two dissimilar topics within law (philosophy of law and legal education), one of which is currently of prominent interest to many legal professionals (legal education), I hope to offer a more robust and comprehensive demonstration of the value of the distinction than would have been possible had my focus remained bound to a single focus or areas of potential application. This enables my thesis to demonstrate the wider scope of these terms ('thick' concept and 'thin' concept), and ensures the strength of my single thesis: that thick and thin concepts are useful within law.

Limiting my thesis to the deployment of this distinction as an analytic tool better captures the spirit of analysis from which it derived, and ensures that it is not necessary (or even helpful) to entertain the philosophical disputes concerning the possible metaphysical nature of thick and thin concepts if perceived to be metaphysical entities. Despite this limitation, my thesis may still be of interest to philosophers interested in the possible perception of thick and thin concepts as metaphysical entities, because investigating the use and usefulness of thick and thin concepts within law provides the opportunity to better understand the pressures exerted on concepts (and conceptual analysis) in social practices such as law, and this can be revealing and rewarding for both philosophers and legal practitioners.¹⁴ Indeed, Bernard Williams noted that legal

¹² The cuts to legal aid implemented by LASPO 2012 have dramatically eroded the 'social service' aspect of the legal profession.

¹³ The legal profession and legal system is undergoing a series of changes due to these legislative enactments (such as those noted in the previous two notes), the full impact of these enactments remains unknown.

¹⁴ This is presented as a law thesis and aimed at a legal audience, but due to the interdisciplinary nature of this thesis and the close connection between the philosophical and legal ideas relating to concepts and conceptual analysis the relevance of this thesis may extend further than a legal audience. Bernard Williams is one of the key theorists of this thesis and is a prime example of a theorist who argued for the benefits of interdisciplinary work. Williams was a philosopher whose primary field of research was ethics, but he also published work within jurisprudence (amongst other fields), see: Bernard Williams, 'Afterword What Has Philosophy to Learn from Tort Law?' in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) and Bernard Williams, 'Professional Morality and Its Dispositions' in David Luban (ed), *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (Rowman & Allanheld, 1983), which both argue for the usefulness of interdisciplinary work between law and philosophy (particularly ethics).

cases exert pressure on concepts that can enrich the philosophers understanding of concepts.¹⁵

Ambition, Structure and methodology of the thesis.

This thesis amounts to a sustained argument in favour of the value to law of thickness and thinness as a distinction between concepts. Over the following nine chapters I intend to articulate and support this claim, though at times (particularly in the early stages) my style and overarching argument will necessarily have to be expository and descriptive. When I consider the legal literature on thickness and thinness as a distinction, the writings and the areas of application have been deliberately selected on the basis that they best support and demonstrate my claim (the value of this distinction for law). This may be because the area is of manifest significance and interest (for example my study of H. L. A. Hart's legal positivism, which has significant relevance for general jurisprudence), or because it shows the practical benefits of the distinction (as is the case with legal education). Success in demonstrating the value of thickness and thinness as a distinction between concepts within these areas will at least be a prompt for future research in other areas, though the indication that this distinction has value within other areas of law will only be an implication of my thesis. The value of my analysis, claim and argument therefore lie in the usefulness I demonstrate in the topics canvassed in the forthcoming chapters.

For these reasons, and in light of my general aim, the thesis is structured in the following way. This thesis begins with an exposition of the meta-ethical treatment of the distinction because although it is legal concepts that are the subject of my thesis, much of the literature on concepts and conceptual analysis engaged with is not specific to law and legal concepts, the distinction between thick and thin concepts is borrowed from meta-ethics and therefore specifically addresses ethical concepts (hence chapters two through four are located within meta-ethics). Similar philosophical issues arise in both disciplines regarding the analytic tradition's philosophical treatment of concepts and the conceptual analysis this generated (as demonstrated by chapter two). Outlining these philosophical issues can help to better understand how the ideas of thick and thin

¹⁵ Williams was referring specifically to thick and thin legal concepts, see: Bernard Williams, 'Afterword What Has Philosophy to Learn from Tort Law?' in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995)

concepts and the accompanying literature can prove useful for law. Chapter two therefore covers essential philosophical terrain relating to concepts and conceptual analysis that will be built upon by the later legal application of the distinction between thick and thin concepts.

There is much controversy within the literature on thick and thin concepts regarding the appropriate framing of the distinction and the content that this distinction identifies. Chapter three addresses some of the many formulations that help to highlight key aspects of the controversy and the philosophical problems faced by thick and thin concept theorists, this chapter is important in fostering a better understanding of both the terminology and the nature of the distinction, which will be important for my later analysis of the legal application of the distinction and accompanying claim that the legal understanding of this distinction needs sharpening.

At no point is an argument in favour of any one particular formulation of the distinction between thick concepts and thin concepts advanced. Instead Bernard Williams' work on thick concepts is chosen because of its central importance: he is accredited in both the legal and meta-ethical literature as the first to coin in print the term 'thick' ethical concept;¹⁶ it is his formulation of thick and thin that is most commonly referenced by the legal literature;¹⁷ he has noted both the existence of thick and thin legal concepts and the relevance of these ideas for enriching the philosophical understanding of thick and thin;¹⁸ and many of his wider ethical claims relating to the distinction between thick and thin ethical concepts are relevant and useful for other social practices such as law.

Williams' work remains a central focus throughout the following chapters; his ideas – both his specific formulation of thick and thin concepts and his wider arguments regarding thick and thin – are cited throughout the legal literature on thick and thin

¹⁶ see note 2

¹⁷ The majority of the theorists cited in note 3 reference Williams on thick and thin concepts.

¹⁸ see note 15

(chapters five through seven);¹⁹ in addition to this, he has published within law regarding thick concepts.²⁰

Despite acknowledgment by prominent legal theorists such as Lawrence Solum of their importance for law (in general),²¹ thick and thin concepts are commonly misunderstood by the legal theorists that cite these terms. Although chapter five is not intended as a literature review it does collate together a number of legal sources and disparate uses in an attempt to provide an overarching conspectus of thick and thin within law, which supports my argument: that the legal understanding of thickness and thinness as a distinction between concepts needs sharpening and rendering more consistent, for it is only then that the full value of this analytic tool can be realised (for law). The distinction between philosophy of law, legal theory and jurisprudence is often hard to articulate and is to a certain extent superfluous to my thesis, as my argument for the value of thickness and thinness as a distinction between concepts extends to all three.²²

Chapter six analyses the value of this distinction in enriching understanding of H. L. A. Hart's *The Concept of Law*,²³ which is considered a seminal text however legal theoretical scholarship is conceived. Demonstrating the usefulness of the distinction in addressing Hart's legal positivism adds strength to my thesis because of the central importance of Hart's legal positivism: legal positivism is still the current model for the United Kingdom's legal system and many of the philosophical issues addressed by Hart remain a central starting point for any theory (or philosophical narrative) that wishes to

¹⁹ His work is also used within philosophy of education to argue for the epistemic benefits of conceiving of EDUCATION (and many other associated epistemic concepts) thickly. Catherine Elgin utilises Williams' work on thick concepts to argue for a kind of epistemic confidence that can be derived through conceiving epistemology thickly. See: Catherine Z. Elgin, 'Trustworthiness' (2008) 37 (3) *Philosophical Papers* 371; Catherine Z. Elgin, 'Epistemology's Ends, Pedagogy's Prospects' (1999) 1 *Facta Philosophica* 39

²⁰ see note 14

²¹ Solum notes their importance in his online blog on legal theory: Lawrence B. Solum, 'Legal Theory Lexicon', (2012) <<http://lsolum.typepad.com/legaltheory/2012/01/legal-theory-lexicon-fact-and-value.html>> accessed December 2012. He also utilises the distinction to varying degrees in the following articles: Lawrence B. Solum & Colin Farrelly (eds), *Virtue Jurisprudence* (Palgrave Macmillan, 2008); Lawrence B. Solum, 'Virtue Jurisprudence: A Virtue-Centred Theory of Judging' (2003) 34 *Metaphilosophy* 178; Lawrence B. Solum, 'Judicial Selection: Ideology Versus Character' (2005) 26 *Cardozo Law Review* 659; Lawrence B. Solum, 'Virtue Jurisprudence: Towards an Aretaic Theory of Law' in Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho (eds), *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (Springer, 2013); Lawrence B. Solum & Linghao Wang, 'Confucian Virtue Jurisprudence' in Amalia Amaya & Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing, 2013)

²² I favour the term philosophy of law within my thesis and refer to chapters five through seven as being located within philosophy of law.

²³ H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd edition 1994)

elucidate the nature of law. Within this chapter I also consider the thick concept LEGAL VALIDITY, my argument here being used as a test case to reveal the possibilities for analysing specific legal concepts, which further supports the relevance of this distinction to analytic conceptual analysis within law. It is important to address specific legal concepts (the concepts that feature in legal statements and legal judgments), such as LEGAL VALIDITY, because the distinction has been most commonly employed by meta-ethicists as a tool to better understand specific normative concepts, and because the value this analytic tool offers for enriching our understanding of specific legal concepts is relevant to my later argument (chapter eight) for the distinction's relevance within legal education.

Legal theories such as that proffered by Hart in *The Concept of Law* attempt, amongst other things, explanations of our legal system and legal practices, and in doing so address specific legal issues that have traditionally been the subject of contest and debate. I focus upon two aspects of jurisprudence - the judicial activity and legal objectivity - as in these areas there has already been published research by prominent legal theorists regarding thick and thin concepts.²⁴ Chapter seven uses this existing legal research and publication to support my argument for the value of thickness and thinness as a distinction between concepts (used as an analytic and expository tool) to invigorate jurisprudential debates such as those concerning the judiciary and legal objectivity. At no point is it implied or intended that the distinction could solve long-reigning jurisprudential debates in these areas (though some may be resolved to) - my argument principally offers a possibility for reframing traditional jurisprudential problems and facilitating new research ideas and discussion.

The individual arguments for the value of the distinction between thick and thin concepts employed within law in relation to legal concepts, legal positivism and key jurisprudential debates (chapters five through seven), are advanced in support of my thesis and the overall argument that runs throughout: that the distinction between thick and thin concepts has value for law, but that this value is currently limited because legal understanding of this distinction needs sharpening and rendering more consistent.

²⁴ David Enoch and Kevin Toh, 'Legal as a Thick Concept' in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013); Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, 2004); Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Lawrence B. Solum, 'Legal Theory Lexicon', (2012) <<http://lsolum.typepad.com/legaltheory/2012/01/legal-theory-lexicon-fact-and-value.html>> accessed December 2012 and Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011)

These individual arguments (chapters five through seven) form one overall argument for the relevance of thick and thin concepts to philosophy of law, which in this investigation is one of two areas of law subject to examination. Thick and thin have already been successfully utilised within educational theory by prominent philosophers of education, such as Harvey Siegel²⁵ (particularly in relation to epistemological issues).²⁶ Chapter eight draws upon this literature in arguing for the relevance of thick and thin concepts within legal education.

Chapter eight argues that thick and thin concepts are relevant to two key aspects of legal education: the method(s) of teaching law and the ethical values fostered by legal education. At present, the future of the legal profession and legal education are unclear as the effects of recent legislative changes are yet to be fully realised or understood, but it is clear at least that the method(s) of teaching law and the ethical values fostered by legal education will be important topics in the debate concerning the future of the legal profession, as this was identified by the Legal Education and Training Review (LETR). In light of continuing uncertainty in this arena, the aim of chapter eight is to demonstrate the usefulness of thickness and thinness for legal education in the hope of facilitating wider research and discussion of these philosophical ideas within law, especially regarding matters pertaining to legal education. Research generated and decisions made within the field of legal education have practical implications for many other areas of law, and have the potential to alter the shape of the legal system and therefore legal practice; therefore if this chapter successfully demonstrates the value of thickness and thinness within legal education it helps further to demonstrate that my thesis has both broad theoretical scope and practical relevance for law.

In addition to my central thesis there is an underlying assumption running throughout, which culminates in the approach offered in chapter eight: that all aspects of the legal profession are connected (legal practice, legal education, legal ethics, legal regulation

²⁵ Harvey Siegel (ed), *The Oxford Handbook of Philosophy of Education* (Oxford University Press, 2009); Harvey Siegel, 'Epistemology and Education: An Incomplete Guide to the Social-Epistemological Issues' (2004) 1 (2) *Episteme* 129; Harvey Siegel, 'Truth, Thinking, Testimony and Trust: Alvin Goldman on Epistemology and Education' (2005) 71 (2) *Philosophy and Phenomenological Research* 345; Harvey Siegel, 'Is Education a Thick Epistemic Concept' (2008) 37 (3) *Philosophical Papers* 460

²⁶ Ben Kotzee, 'Education and "Thick" Epistemology' (2011) 61 *Educational Theory* 5, 549; Ben Kotzee and Jeremy Wanderer, 'A Thicker Epistemology?' (2008) 37 (3) *Philosophical Papers* 337; and Harvey Siegel, 'Is Education a Thick Epistemic Concept' (2008) 37 (3) *Philosophical Papers* 460

and legal research),²⁷ and that changes within one aspect of the legal profession will in some way impact upon other aspects of the legal profession. As discussion proceeds through successive chapters, and as I draw on more examples of these connections in the service of my thesis, my claims about the interconnections at issue take on the quality of an argument both for their existence and importance. In this manner it is therefore suggested that the recent legislative changes and resulting shifts in the legal landscape will affect and lead to changes within many, perhaps all areas of the legal profession. Considering the interrelated nature of these aspects of law, although it is not directly argued, the implication is that if thickness and thinness have value for one aspect of law, it is likely that they will have value for other aspects of law, although this would need to be determined by further research.

Finally it is important to note that because my thesis aims are overarching – to demonstrate the use and usefulness of thick and thin within law – I have employed a number of brief examples of thick concepts particularly thick concepts that have been deployed within legal cases (chapters five through eight), to demonstrate the benefit of both recognising and operating with the distinction between thick and thin concepts within law. These examples are brief and can be in light of the groundwork undertaken in my early chapters to demonstrate the philosophical, metaphysical and ethical commitments that are necessarily entailed by adoption of the distinction. The employment of examples highlights not only the existence of thick and thin concepts within law, particularly case law, but it also facilitates a wider argument within my thesis that deployment of thick and thin concepts within law brings to attention key jurisprudential questions, such as the distinction between facts and values which is central to the debate between separationists and non-separationists within the thick-thin literature and the debate between legal positivists and natural lawyers within jurisprudence. The distinction between thick and thin concepts therefore has significant implications for our general theories of law, such as legal positivism (as I demonstrate in chapter six), which can be brought to life in every single case that deploys thick concepts.

This thesis has been structured in the above way, as this best supports the aims and objectives of my research, and offers the strongest support possible for my thesis: that

²⁷ This list is not exhaustive there may be other areas of the law that could be highlighted, but this chapter addresses these particular areas.

the distinction between thick and thin concepts has value within law. As my thesis concerns a distinction between different concepts, which is an analytic tool that can be used within conceptual analysis, it is concepts and conceptual analysis that I now turn my attention to in the following chapter.

Chapter Two: Concepts and Conceptual Analysis

1 – Introduction.

The division of concepts into thick concepts and thin concepts was part of wider developments and changes in 20th century analytic conceptual analysis; this chapter therefore begins (section two and three) by locating this division of concepts (into thick and thin) within the wider literature on concepts and conceptual analysis (in both philosophy and law). This preliminary exposition is important because it covers essential philosophical terrain that is helpful in understanding the close connection between law and philosophy regarding the interrelated philosophical ideas of ‘concepts’ and ‘conceptual analysis’. The assertion that the philosophical literature on thick and thin concepts could be useful for legal conceptual analysis is supported by the close connection between law and philosophy. The division of concepts into thick and thin just so happened to be played out in a particular branch of philosophy – meta-ethics, and this is where the majority of the literature on thickness and thinness is located, therefore the ideas at issue in this chapter (sections four and five) and the next two are firmly located within meta-ethics, in which ethical concepts take centre stage.

2 – Concepts.

The term ‘concept’ is the modern replacement for the older term ‘idea’ (stripped of some of its original associations) and thought to be intimately connected to language, although the extent of this intimacy is contested.²⁸ Certain technical concepts seem to be beyond the grasp of ‘languageless’²⁹ creatures and have previously been thought to be beyond the grasp of infants (and or young children),³⁰ but there are certain basic

²⁸ Concepts are also of importance to an overall theory of cognition and the mind see: Dennis Earl, ‘Concepts’ (Internet Encyclopedia of Philosophy) <www.iep.utm.edu/concepts/> accessed 10 March 2015

²⁹ This is the terminology used by Bede Rundle, ‘Concepts’ entry in Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 2nd edition, 2005). I have in mind those incapable of human language or ‘reflexive subconsciousness’ (see John Locke) such as animals (even if they may be capable of interaction within and outside their own species).

³⁰ It was originally thought that infants and young children lacked conceptual abilities as these were acquired throughout childhood. Recent research has challenged this see Gregory L. Murphy ‘Concepts in Infancy’ and ‘Conceptual Development’ in *The Big Book of Concepts* (MIT Press, 2004). Eric Margolis, ‘How to Acquire a Concept’ in Eric Margolis and Stephen Laurence (eds), *Concepts Core Readings* (MIT Press, 1999); Renee Baillargeon ‘The Object Concept Revisited: New Directions in the Investigation of Infants’ Physical Knowledge’ in Eric Margolis and Stephen Laurence (eds), *Concepts Core Readings* (MIT Press, 1999); and Susan A. Gelman and Harry M. Wellman ‘Insides and Essences: Early Understandings of the Non-Obvious’ in Eric Margolis and Stephen Laurence (eds), *Concepts Core Readings* (MIT Press, 1999)

attributes that both humans and animals share that indicate a common conceptual ability.³¹ It is the nature of this conceptual ability that has been controversial.³² Concept users are often judged on their ability to grasp a concept or to possess a concept;³³ but this seems to require a whole host of capacities such as applying the concept to existing and new cases (this could also include misapplication), abandoning the concept for an alternative concept or modifying the existing concept - all of which are more complicated than the basic ability to respond differently to things which fall under the concept (this can be achieved by a languageless creature).³⁴ This section expands on the basic notion of a concept and introduces some of the many issues associated with concepts and conceptual analysis,³⁵ which are present in both the meta-ethical literature on thick and thin concepts and the legal literature on legal concepts.³⁶ This philosophical exegesis covers important philosophical ground that is often much needed and rarely found in the existing legal literature on thick and thin concepts.

³¹ Nicola S. Clayton, Timothy J. Bussey & Anthony Dickinson, 'Can animals recall the past and plan for the future?' (2003) 4 *Nature Reviews: Neuroscience* 685; Susan Hurley & Matthew Nudds (eds), *Rational Animals?* (Oxford University Press, 2006); and Marc D. Hauser, *Wild Minds: What Animals Really Think* (Penguin, 2000)

³² Our conceptual abilities have been investigated in a number of disciplines; for example both philosophers and psychologists have investigated colour concepts (e.g. RED, BLUE, GREEN etc.) and colour perception. For example see: Jules Davidoff, 'Language and perceptual categorisation' (2001) 5 (9) *Trends in Cognitive Sciences* 382

³³ The notion of possessing a concept is precarious, for example do we mean that there is only one way to possess a concept (the 'right' way) and if so how do we identify this way. Dennis Earl, 'Concepts' (Internet Encyclopedia of Philosophy) <www.iep.utm.edu/concepts/> accessed 10 March 2015

³⁴ There is a preliminary question that I have brushed over: can there be concepts without language? Some philosophers such as Robert Brandom, Michael Dummett and Donald Davidson maintain that possession of natural language is necessary for having any concepts and a tight connection between the two can be established on a priori grounds. See Robert B. Brandom, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press, 1994); Michael Dummett, *Seas of Language* (Oxford University Press, 1993); see also: Donald Davidson, 'Thought and Talk in Inquiries' in *Truth and Interpretation* (Oxford University Press, 1975). Other philosophers such as Jerry Fodor and Steven Pinker maintain that concepts are prior to and independent of natural language on the grounds that natural language is just a method of conveying thoughts. See Jerry Fodor, *The Language of Thought* (Harvard University Press, 1975) and Steven Pinker, *The Language Instinct: The New Science of Language and Mind* (Penguin, 1994). Others such as Peter Carruthers and Elizabeth Spelke occupy a kind of halfway position maintaining that at least some concepts occur within the internal system of representation (constituted by natural language) and therefore require competency with natural language. Peter Carruthers, *Language, Thought, and Consciousness* (Cambridge University Press, 1996); Peter Carruthers, 'The Cognitive Functions of Language' (2002) 25 (6) *Behavioural and Brain Sciences* 657 and Elizabeth Spelke, 'What Makes Us Smart? Core Knowledge and Natural Language' in D. Gentner & S. Goldin-Meadow (eds), *Language in Mind* (MIT Press, 2003), 277-311

³⁵ For a brief introduction see Bede Rundle, 'Concepts' entry in Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 2nd edition, 2005)

³⁶ Law is a social practice or institution and legal concepts have therefore received mixed treatment. Many of the conceptual problems in law arise because some theorists seem to be taking a descriptive approach towards law whilst also making conceptual claims (claims about the nature of the concept LAW or individual legal concepts). H. L. A. Hart is an example of a theorist whose work has been criticized in this manner, for more detail see chapter six of my thesis.

The-Nature of Concepts.

There is much controversy surrounding ‘the nature of concepts – the kinds of things concepts are – and the constraints that govern a theory of concepts have been the subject of much debate. This is due, at least in part, to the fact that disputes about concepts often reflect deeply opposing approaches to the study of the mind, to language, and even to philosophy itself.’³⁷ Our concepts are the embodiment of much of our knowledge of the world and they help us navigate through the world and interact with others. Thus comments such as Murphy’s are typical of the wider literature:

If we have formed a concept (a mental representation) corresponding to that category (the class of objects in the world), then the concept will help us understand and respond appropriately to a new entity in that category. Concepts are a kind of mental glue, then, in that they tie our past experiences to our present interactions with the world, and because the concepts themselves are connected to our larger knowledge structures.’³⁸ They help us identify new things in the world and what properties they have so that we can use our knowledge of past experiences and apply this to new exemplars of these categories.³⁹ They are crucial to many psychological processes such as ‘categorization, inference, memory, learning and decision-making.’⁴⁰

Concepts play a key role in linguistic practices - our linguistic utterances express propositions which also express concepts - and concepts are closely connected to the meanings of linguistic entities such as predicates and adjectives.⁴¹ When we converse we attempt to communicate our ideas about objects, people, and events and we understand these through the use of certain concepts therefore our words and sentence meanings are connected to specific concepts. These capacities involve claims of knowledge and therefore concepts play an important role in epistemology.⁴² Concepts are important to a wide array of philosophical disciplines and any general theory of

³⁷ The term ‘concept’ can be traced back to the Latin *conceptum* – *something conceived*. Eric Margolis and Stephen Laurence, ‘Concepts’ (Stanford Encyclopedia of Philosophy first published 7 Nov 2005, substantive revision 17 May 2011) < www.plato.stanford.edu/entries/concepts/ > accessed 4 March 2015

³⁸ Gregory L. Murphy, *The Big Book of Concepts* (MIT Press, 2004), 1.

³⁹ Concepts are of importance to any theory of cognition and the mind because it is by appeal to various facts involving concepts and our grasp of such concepts that we can analyse and distinguish various thoughts (especially those which involve/express propositions).

⁴⁰ See note 38

⁴¹ Dennis Earl, ‘Concepts’ (Internet Encyclopedia of Philosophy) < www.iep.utm.edu/concepts/ > accessed 10 March 2015

⁴² See note 38

concepts will have implications for philosophy of mind, philosophy of language, cognitive science and psychology.⁴³

The psychology of concepts post 1960 has revealed that this phenomenologically simple process (like many other phenomenological processes such as understanding, walking or speech) is a far more complex scientific problem than previously thought.⁴⁴ Both epistemological and metaphysical questions about concepts arise in the legal and meta-ethical literature.⁴⁵ The distinction between and analysis of concepts based on their thickness and thinness, and philosophy of law, demonstrate the many issues that arise when trying to generate a theory of concepts (especially an overall theory).⁴⁶ This thesis does not generate a theory of concepts but it does advocate a particular approach towards concepts – the philosophical distinction between thick concepts and thin concepts.

⁴³ *ibid*

⁴⁴ Concepts apply to many of the categories that are of interest to psychologists (such as social and person categories, emotions, linguistic entities, events, and actions) and we rely on these categories to direct our behavior (even if sometimes we directly observe reliable information contrary to this). Psychological approaches to concepts and conceptual analysis are not considered in this thesis as they are outside the parameters of my research (such a detailed investigation of conceptual analysis in this field would distract from my research aim), but it is interesting for thick and thin concept theorists to consider how this literature could be relevant for their method of conceptual analysis.

⁴⁵ Concepts seem to be the sorts of entities that are grasped, possessed or understood as a part of belief formation (and knowledge) about the world, but grasping, possessing and understanding are far from straightforward notions. We use concepts to categorize features of the world and this behavior is a prerequisite for various kinds of knowledge. Epistemologists are interested in the notion of categorization and psychologists are interested in our behavior when we categorize. The most basic metaphysical question asks what is the nature of a 'concept'? Answering this involves identifying the identity conditions for concepts or a specific concept and therefore answering a host of other questions such as: are concepts universal (is there only one concept of BEING A STAR or do agents have their own individual concepts of BEING A STAR)? Are concepts mind-dependent i.e. particular ideas in one's mind or mind-independent entities such as predicates or references to objects? How do we distinguish between different concepts (identity conditions) and are some concepts more metaphysically complex than others? There are obviously many more metaphysical questions that could be asked but these are a good starting point.

⁴⁶ Legal language is one area where the relationship between the physical and metaphysical is under constant scrutiny. Marnie Riddle argues that the ever increasing influence of science and the physical can be seen through changes in legal language and legal theory, legal positivism has extended the logical positivist approach to previously unscientific terms and concepts, terms that were traditionally considered to be metaphysical and therefore meaningless by the positivists. These previously metaphysical terms have begun to metamorphose into the physical and taken on a whole new level of meaning, this has resulted in layers of the metaphysical which were previously unknown being revealed. See: Marnie Riddle 'Reasonable Discourse: A Philosophical Discourse on Language' (1997) <<https://zainurrahmans.wordpress.com/2009/04/15/a-philosophical-discourse-on-language/>> accessed 2 November 2014

Key Issues.

One of the key issues that has gripped concept analysts is ‘concept mastery’: grasping the meaning of a concept.⁴⁷ The issue is wide reaching because it affects both internal and external participants to a practice; for example, how do those external to the legal practice understand legal concepts?⁴⁸ ‘Concept mastery’ ties directly to concept application - whether that application successfully tracks or reflects our understanding of the concept – but successful application of a concept may not be the result of concept mastery, and this requires criteria for judging whether the application was successful that will at least in part be guided by grasping the meaning of the concept.

James Higginbotham discusses the difference between ‘concept mastery’ and ‘concept acquisition’, proposing a threefold distinction between ‘(i) merely possessing a word, or having it in one’s repertoire, and so being able to use it within its meaning; (ii) knowing the meaning of the word; and (iii) having an adequate conscious view of its meaning.’⁴⁹ Higginbotham seems to be arguing that someone may possess a concept such as CHAIR whilst failing to count objects with three legs that can be sat upon among chairs, revealing that their conception of chairs (not their conception of A CHAIR) is inaccurate; therefore revealing that they have not mastered the concept CHAIR.⁵⁰ Similarly they may master the concept CHAIR and yet their conception of a chair may not be conscious; therefore even under ideal circumstances a person could

⁴⁷ For some further reading see: Melissa Bowerman and Stephen C. Levinson (eds), *Language Acquisition and Conceptual Development* (Cambridge University Press, 2001); Ray Jackendoff, ‘What is a Concept, that a Person May Grasp It?’ (1989) 4 *Mind & Language* 68; and Eric Margolis, ‘How to Acquire a Concept’ in Eric Margolis and Stephen Laurence (eds), *Concepts Core Readings* (MIT Press, 1999)

⁴⁸ This problem exists at many levels for example within a particular country and on an international scale such as the European Union, how do different member states understand EU legal concepts? I return to the distinction between internal and external participants within chapter six.

⁴⁹ James Higginbotham, ‘Conceptual competence’ (2009) 9 *Philosophical Issues* 149. Genoveva Marti opines that ‘it is better to understand the structure of the argument not so much as proposing a distinction between three different notions, but rather as advancing two different distinctions: one is a distinction between tacit and explicit conceptions associated with concepts. The other distinction, which cuts orthogonally, separates mastery from possession of concepts.’ Genoveva Marti, ‘The Significance of the Distinction between Concept Mastery and Concept Possession’ (1998) 9 *Philosophical Issues* 165. For a discussion of Higginbotham’s paper see also: Pierre Jacob, ‘Conceptual Competence and Inadequate Conceptions’ (1998) 9 *Philosophical Issues* 169; Joseph Macia, ‘On Concepts and Conceptions’ (1998) 9 *Philosophical Issues* 175; and Maite Ezcurdia, ‘The Concept-Conception Distinction’ (1998) 9 *Philosophical Issues* 187

⁵⁰ Concept mastery is a complex notion and ordinary language philosophers such as Gilbert Ryle have focused on our concept use. He highlighted that you can quite plausibly describe someone as using an expression illogically or meaninglessly, but it is implausible to describe the ‘concept’ as illogical or meaningless (if you were to refer to them individually without context). See: Gilbert Ryle, ‘Ordinary Language’ in *Collected Essays 1929-1968* (Routledge, 2009)

not articulate or fully explicate what a chair is. ‘Concept acquisition’ or possession does not necessarily lead to ‘concept mastery’ but the question remains, then, what is meant by ‘concept mastery’, and in particular, whether it amounts just to conceptual competence or something more advanced.

Higginbotham defines conceptual competence as the state of mind of an individual who knows the nature of his own concepts:⁵¹

The distinction between the meaning of a word for a person and the person’s tacit conception of the meaning allows us to ascribe expressions of thoughts to that person, whose content she herself only partly understands, or even misconceives. It also allows us, in my view appropriately, to see the process of language acquisition as coming to know the meaning of words, where at a given stage the learner’s conception is an hypothesis about the meaning. Likewise, if there is a distinction between the concept that a person possesses and her conception of it, it will be appropriate to ascribe to that person thoughts involving the concept that she only partly apprehends, or even misconceives; and the distinction allows us to view a person’s increased sophistication with a concept as a consequence, not of progressive replacement in thought of one concept by another, but of acquiring a more adequate conception.⁵²

Higginbotham’s distinction between the concept itself and the conception of things falling under the concept works best if the process from concept acquisition to conceptual competence is seen as a gradual process (allowing for different degrees of grasping or mastering the concept). Conceptual competence according to this model is not a yes/no issue because there are different degrees of conceptual competence (in the same way that there are different degrees of language competence);⁵³ and this challenges the idea that those agents who exhibit lower degrees of conceptual competence should be described as attaching labels to concepts wrongly.⁵⁴ Conceptual

⁵¹ Within the same volume see Pierre Jacob’s response to Higginbotham on conceptual competence: Pierre Jacob, ‘Conceptual Competence and Inadequate Conceptions’ (1998) 9 *Philosophical Issues* 169

⁵² see note 49 at 153

⁵³ For an ordinary language philosophy approach see: Gilbert Ryle, ‘Thinking Thoughts and Having Concepts’ in *Collected Essays 1929-1968* (Routledge, 2009). He considers how we acquire knowledge of a concept. When acquiring knowledge of a concept there is the point at which you do not possess such knowledge and the point at which you do possess such knowledge; but in between there is a point at which you cannot be said to fully ‘possess the concept’ but you can also no longer be said to not possess it. Ryle argues that there may be many stages in the development of concept acquisition, there maybe many ‘intellectual’ and ‘conversational’ tasks that need to be mastered involving that particular concept. Throughout the process of mastering these tasks we gradually acquire a better grasp of the concept.

⁵⁴ In the 1950’s and 1960’s W. V. Quine and Hilary Putnam challenged the traditional notions of a priori conceptual inquiry and noted that science sometimes overturns those concepts that we hold as most

analysis grapples with these challenging issues and is the topic of the next section. It is also the primary topic of this thesis in which an investigation is made into the usefulness of a particular form of philosophical conceptual analysis (the division of concepts into thick concepts and thin concepts) applied to law.

3 - Conceptual analysis.

Conceptual analysis – that is, ‘the attempt to solve philosophical problems, or exhibit them as illusory, by defining words or being clear about how concepts are used’⁵⁵ - relies heavily on philosophical logic as it is premised on demonstrating the entailment of various definitions through the process of logical deduction.⁵⁶ Analytical and definitional approaches to concepts can be problematic because some concepts seem resistant to analysis or verbal definition.⁵⁷ It can be useful to consider the purpose of such definitional approaches. Brian Bix,⁵⁸ identifies three possible objectives:

- (1) they can be an attempt to track and explain linguistic usage; (2)
- they can be an attempt to discover the “significance” of a concept, hidden in our practices and intuitions regarding usage; or (3) they
- can impose moral or qualitative criteria which must be met before the label should be applied (perhaps on the basis that such criteria are deeply embedded in our usage).⁵⁹

established. See Hilary Putnam, ‘The Analytic and the Synthetic’ in H. Feigl & G. Maxwell (eds), *Minnesota Studies in the Philosophy of science, Volume III*. (University of Minnesota Press, 1962). Putnam and Saul Kripke emphasized that we can possess a concept despite being ignorant or mistaken about the kinds of thing the concept picks out. See Saul Kripke, *Naming and Necessity* (Harvard University Press, 1972)

⁵⁵ Stephen Priest, ‘Conceptual Analysis’ entry in Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 2nd edition, 2005)

⁵⁶ This led to the idea that philosophy should be conducted from the proverbial armchair as it was essentially the a priori analysis of concepts.

⁵⁷ The later Wittgenstein argued that not all concepts could be categorized in terms of necessary and sufficient conditions because there was no class of definitional features that all items falling under that concept class possessed. This is where ordinary language philosophy re-surfaces because he argued that philosophers should focus on linguistic usage rather than definitions.

⁵⁸ This chapter addresses many of Bix’s ideas on conceptual analysis in law as discussed in: Brian Bix, ‘Conceptual Questions and Jurisprudence’ (1995) 1 (4) *Legal Theory* 465 and Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition, 2012)

Andrew Haplin challenges Bix’s analysis of concepts in Andrew Haplin, ‘Concepts, Terms and Fields of Enquiry’ (1998) 4 *Legal Theory* 187

⁵⁹ Bix’s distinction between the second and third category distinguishes between evaluations of “significance” that at least purport to be morally neutral (for example H. L. A Hart’s discussion of legal rights), and those definitions where moral judgements are used openly and are encouraged (for example the work of natural law theorists). *ibid* Bix at 471

Haplin argues that we need to distinguish carefully between terms and labels when discussing concepts and categories and prefers the use of ‘term’ as opposed to ‘label’: ‘First, I shall favour at a more elementary level “term” over “label,” so as to be able to convey those instances where terms that may be

Very few conceptual theories aim simply to track usage (there is often a tie to use but it is a loose one),⁶⁰ and theorists who do pay attention to use usually do so because they believe a deeper, more interesting truth can then be revealed.⁶¹ The second justification for conceptual definitions asserts that a particular definition is justified on the basis that it better displays interesting or important aspects of the practice (that may be hinted at by our linguistic practices);⁶² these underlying judgments may be insufficiently objective though. A theorist could maintain their definition even if an alternative (potentially better fitting) definition is available,⁶³ and this can lead to theoretical stalemate between two theorists who have different views of (for example) law's objectives.⁶⁴ The third approach suggests establishing standards that must be met for the relevant label to apply.⁶⁵ Could these standards ever remain morally neutral or would we need to resort to evaluations? Thick concepts through their combination of evaluative and descriptive raise this question and many more. The controversy surrounding thick and thin ethical concepts stems in part from problems of definition: how do we define or analyse the terms thick ethical concept and thin ethical concept and then how do we identify which concepts count as thick and which count as thin. In order to begin to address these issues it is helpful to provide an outline of the most orthodox approach to conceptual definition, which happens to be the theory that has most typically been deployed in legal analysis, too.

used as labels for specific concepts are being employed for a different purpose: so as to convey the subject matter under investigation as constituted by material objects, or social phenomena, or whatever the subject matter may comprise – even an imprecise collection or tradition of thoughts; or so as to convey some subject matter that is not properly or sufficiently identified – where the term is left (at least partially) inexplicated and must be explicated in order to fulfil any useful role; or indeed, to cover the possibility of the term being employed simultaneously for different labels pertaining to quite distinct concepts. *ibid* Haplin at 189

⁶⁰ Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, 1994), 179-82 discusses linguistic approaches to the nature of law.

⁶¹ This idea has many interesting parallels with debates in other areas of philosophy, such as philosophy of language and metaphysics. Michael Dummett has argued that a theory of language and a theory of meaning offer a good starting point for addressing metaphysical questions about physical reality. See: Michael Dummett, *The Logical Basis of Metaphysics* (Harvard University Press, 1991)

⁶² For example see: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), 3-11; or note 60 at 216-218

⁶³ For example Hart defended his 'claim theory' of legal rights on the basis that his definition captured an important aspect of peoples perception and experience of legal rights; even though he conceded that there was an alternative definition that better fitted the current use of the legal term. See H. L. A. Hart, 'Legal Rights' in *Essays on Bentham* (Clarendon Press, 1982)

⁶⁴ The classic example of such unresolvable disagreement is between legal positivists and their critics. See H. L. A. Hart, 'Postscript' in *The Concept of Law* (Oxford University Press, 1994), 248-9 contrasting his views with Ronald Dworkin regarding the primary purpose of law.

⁶⁵ For example you might believe that a piece of writing can only be called "literature", or an object that has been created can only be called "art", if it has stood the test of time.

The Classical Theory of Concepts.

The classical theory of concepts and conceptual analysis (also referred to as the empiricist theory of concepts or definitionism)⁶⁶ dominated philosophy until the 1970's.⁶⁷ Theories regarding the structure of concepts (post the classical theory) are developments of or reactions to the classical theory⁶⁸ (the competing theories of thick and thin concepts that are addressed in the next chapter are a prime example of this). According to the classical theory concepts have a definitional structure: a list of features that something must possess to be a member of that particular class of concept (these features must be both necessary and sufficient).⁶⁹ BACHELOR is one of the most well known examples: a bachelor is defined by the features *unmarried* and *man* therefore an entity falls under the class of concept BACHELOR if and only if it possesses both of these features. The classical theory's popularity rested on its unified explanation of concept acquisition, categorization and reference determination (these could all be explained by reference to the definitional features of the concept) and its close connection with conceptual analysis.⁷⁰ The classical theory of concepts and conceptual

⁶⁶ It can be traced back to Aristotle and classical philosophy.

⁶⁷ The classical theory of concepts was still popular with early 20th century philosophers such as Gottlob Frege, Bertrand Russell and G.E. Moore and despite falling out of popularity it is still advanced by some contemporary philosophers such as Frank Jackson, 'Armchair Metaphysics' in M. Michael and J.O'Leary-Hawthorne (eds), *Philosophy in Mind* (Kluwer, 1994); Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Clarendon Press, 1998); David Pitt, 'In Defense of Definitions' (1999) 12 (2) *Philosophical Psychology* 139; Christopher Peacocke, *A Study of Concepts* (M.I.T. Press, 1992); and Dennis Earl, *A defense of the Classical View of Concepts* (Doctoral Dissertation, University of Colorado, Boulder, 2002), Dissertation Abstracts International, 63, o6A.

⁶⁸ It is not relevant to my thesis to address these theories individually but it is important for contextual reasons to note that 'at least five general theories of concepts have been proposed: *The Classical theory*, which takes concepts to be analyzed in terms of necessary and jointly sufficient conditions; *neoclassical theories*, which hold that concepts have necessary conditions, but denies that all concepts have individually necessary conditions that are jointly sufficient; *prototype theories*, which take concepts to be accounted for in terms of lists of typical features (instead of metaphysically necessary conditions) or in terms of paradigm cases or exemplars; *theory-theories*, which take concepts to be entities individuated by the roles they play in internally represented "mental" theories (where such a theory is immanent in the mind and of some category or other); and *atomistic theories*, which take most concepts to be primitive unanalyzable entities.' Dennis Earl, 'Concepts' (Internet Encyclopaedia of Philosophy) <www.iep.utm.edu/concepts/> accessed 10 March 2015

See also Entry on Concepts in the Stanford Encyclopedia of Philosophy for more detail. For specific readings on these theories see: Eric Margolis and Stephen Laurence (eds), *Concepts Core Readings* (MIT Press, 1999); and Gregory L. Murphy, *The Big Book of Concepts* (MIT Press, 2004).

⁶⁹ The idea is that the category (concept) can be defined by a set of attributes which are singly necessary (if an item lacks one of these attributes it is not a member of the category irrelevant of how many other necessary attributes it may have) and jointly sufficient (if an item has all the attributes deemed sufficient then it is a member of the category irrelevant of what other attributes it lacks). A similar discussion in modern philosophy now takes place within the topic of Natural Kinds theory. See: Hilary Putnam, 'The Meaning of "Meaning"' in *Philosophical Papers Volume 2: Mind Language and Reality* (Cambridge University Press, 1975), 215-271

⁷⁰ Concept acquisition, categorization and reference can all be explained as different stages of the process of assembling the definitional features of a concept (or assembling new complex concepts from

analysis came under considerable pressure after attacks from within;⁷¹ and outside philosophy.⁷² Within philosophy there are very few examples of successful definitional analyses and those that appear successful are typically controversial.⁷³ The vast literature on the analysis of knowledge and knowledge claims is indicative of the problems faced by classical accounts of conceptual analysis (and therefore, by turns, thick and thin conceptual theorists).⁷⁴ This does not necessarily mean that definitional theories are unobtainable - it may be that definitions are much trickier than previously thought - much of the literature now seriously considers the possibility that our concepts lack a definitional structure.⁷⁵

In analytic philosophy conceptual analysis has undergone a revival despite critical attack in the latter 20th century.⁷⁶ Contemporary conceptual philosophers such as George Bealer,⁷⁷ David Chalmers,⁷⁸ Frank Jackson,⁷⁹ and David Lewis⁸⁰ (among

a combination of simpler concepts and their definitional features), the psychological process of checking the necessary and sufficient features are present and applicable to the entity in question.

⁷¹ For an overview of criticisms of the classical style of analysis see: Gilbert Harman, 'Doubts About Conceptual Analysis' in *Reasoning, Meaning and Mind* (Oxford University Press, 1999), 139-143. One approach was to undermine the analytic/synthetic distinction and with it the classical views commitment to analytic truths. See: Hilary Putnam, 'The Analytic and the Synthetic' in H. Feigl and G. Maxwell (eds), *Minnesota Studies in the Philosophy of Science, Volume III*. (University of Minnesota Press, 1962), 358-397; this was part of the Naturalist attack on philosophy see: David Papineau, *Philosophical Naturalism* (Blackwell, 1993)

⁷² For example psychologists have been critical of the classical theories struggle to explain a robust set of empirical findings, they base this on studies that indicate certain items are more typical and easier to identify as falling under a particular conceptual category e.g. the category of fruit - apples are judged to be a more typical example than plums because apples are judged as having more features in common with fruit and are therefore categorized more efficiently.

⁷³ Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 3rd edition, G. E. M. Anscombe (trans.), 1953-1958) and Jerry Fodor, 'The Present Status of the Innateness Controversy', in *Representations: Philosophical Essays on the Foundations of Cognitive Science* (MIT Press, 1981)

⁷⁴ Since the first challenge to the traditional definition of knowledge as justified true belief by Edmund Gettier (1963) no one has been able to come up with an accepted complete definition. Edward Gettier, 'Is Justified True Belief Knowledge?' (1963) 23 *Analysis* 121

⁷⁵ This is an interesting line of argument that is yet to be fully developed in relation to thick and thin concepts and legal positivism, but it is not one that I will advance in this thesis.

⁷⁶ The naturalist attack on conceptual analysis also took place within legal theory. Brian Leiter argues for the adoption of naturalist analysis and the abandonment of pure conceptual analysis in law. For an overview of naturalism in law and a useful bibliography of relevant texts see Brian Leiter, 'Naturalism in Legal Philosophy' (Stanford Encyclopedia of Philosophy, first published 15 July 2002, substantive revision 31 July 2012) <www.plato.stanford.edu/entries/lawphil-naturalism/> accessed 1 March 2015

⁷⁷ George Bealer, 'The Philosophical Limits of Scientific Essentialism' in Tomberlin, J. (ed), *Philosophical Perspectives 1* (Atascadero, 1987), 289-365. George Bealer, 'Intuition and Autonomy of Philosophy' in Michael DePaul, and William Ramsey (eds), *Rethinking Intuition* (Rowman & Littlefield Publishers, 1998), 201-239

⁷⁸ David Chalmers, *The Conscious Mind: In Search of a Fundamental Theory* (Oxford University Press, 1996)

⁷⁹ Frank Jackson, 'Armchair Metaphysics' in M. Michael and J.O'Leary-Hawthorne (eds), *Philosophy in Mind* (Kluwer, 1994) and Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Clarendon Press, 1998)

⁸⁰ David Lewis, 'Reduction of Mind' in *Papers in Metaphysics and Epistemology* (Cambridge University Press, 1999), 291-324

others), spearheaded this revival by reinterpreting the role of conceptual analysis and arguing that it remains a viable and necessary part of philosophy. Contemporary accounts of conceptual analysis are not merely restatements of past ideas and theories.⁸¹ Contemporary conceptual analysts try to respond to and explicitly engage with the criticisms that led to the decline of conceptual analysis originally, aiming to offer more sophisticated explanations of our practices of conceptual analysis. Despite this resurgence some of the deepest divides amongst contemporary philosophers concern the philosophical problems identified above – the limits of empirical inquiry, the nature of conceptual analysis and subsequently the nature of philosophy – and concepts are at the centre of these philosophical disputes.⁸² Conceptual analysis has not yet regained its original status and this thesis does not provide a defence of analytical conceptual analysis, but it is nonetheless an exercise in legal conceptual analysis, and stands as an argument for it to that extent.

Legal Conceptual Analysis.

Many of the hotly debated issues regarding contemporary conceptual analysis translate into philosophical issues in law. Legal theorists arrived at meta-philosophy much later than other disciplines⁸³ – they have only recently started to seriously question their methodology and the nature of their claims – and by doing so started to explore the role of conceptual analysis in legal theory. This approach can be clearly differentiated from descriptive legal theory.⁸⁴ Joseph Raz in his later work asked – ‘whether conceptual analysis is appropriate to analysing the nature of law and whether one can speak of necessary truths in jurisprudence’⁸⁵ – he answers yes to both.⁸⁶ Julie Dickson argues

⁸¹ Stephen Laurence and Eric Margolis, ‘Concepts and Conceptual Analysis’ (2003) 67 (2) *Philosophy and Phenomenological Research* 253

⁸² David Chalmers, *The Conscious Mind: In Search of a Fundamental Theory* (Oxford University Press, 1996); Michael DePaul, & William Ramsey (eds), *Rethinking Intuition: The Psychology of Intuition and Its Role in Philosophical Inquiry* (Rowman & Littlefield, 1998); Ned Block, & Robert Stalnaker, ‘Conceptual Analysis and the Explanatory Gap’ (1999) 108 (1) *Philosophical Review* 1; Timothy Williamson, *The Philosophy of Philosophy* (Blackwell, 2007)

⁸³ Bix makes a similar claim in his: Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition, 2012), 17

⁸⁴ H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd edition, 1994) and John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980); are two of the most influential descriptive theories of law from the latter 20th century. Both theorists discussed in their texts how it is possible to have a descriptive account of social phenomenon such as law and how such theories can inevitably only capture a portion of the relevant facts of a complex social practice such as a legal system.

⁸⁵ see note 83

⁸⁶ It is important to note that Raz’s notion of ‘necessity’ is different to that found elsewhere in philosophy e.g. logical necessity, Platonic philosophy and Naturalism. ‘Raz treats the/our concept of law as something unique, a matter about which theorists can be right or wrong in their descriptions, and

that ‘all legal theorists take an implicit stand on meta-theoretical or methodological questions such as [the purpose of the theorizing endeavour]. Few, however, address such matters directly, and to the extent to which this does occur, the authors concerned often confine themselves to some relatively brief remarks in the course of pursuing some other agenda.’⁸⁷ Ronald Dworkin agrees that ‘it is difficult to find any helpful positive statements of what these methods and ambitions are ...’⁸⁸ and Brian Bix is equally critical, opining that ‘conceptual analysis is an integral part of legal theory, but the nature and purpose of such inquiries are often not clearly stated.’⁸⁹ Andrew Haplin has noted that this problem may not be specific to philosophy of law, noting that ‘wider reading on conceptual analysis reveals a lack of agreement on what the technique (or art) of conceptual analysis amounts to.’⁹⁰

Bix cautions that we need to place our conceptual theories in context: most legal theories are descriptive in the sense that they usually attempt to describe the world in such a way that we can better understand the events of the past and therefore better predict future events, but that this then introduces some evaluative and prescriptive element.⁹¹ The constantly evolving nature of social practices means that it is not clear why past regularities should dictate future events or be useful in understanding the present practice. As practices change over time the labels (concepts) our conceptual theories generated to refer to those specific practices no longer fit the practice. Wittgenstein uses the example of a game of chess to demonstrate the nature of the problem: if we agree we are playing a game of chess, to what extent can we change the rules and still be playing the game ‘chess’?⁹² At what point does a practice (game)

which they cannot simply reinvent for their own purposes (though he does note that since concepts of law are in flux, our theories of law, even mistaken theories, could influence the concept of law future generations have).’ *ibid* at 17-18

Joseph Raz, ‘On the Nature of Law’ (Kobe Lectures of 1994), (1996) 82 *Archiv für Rechts- und Sozialphilosophie* 1; Joseph Raz, ‘Can there be a Theory of Law?’ In Martin P. Golding & William A. Edmundson (eds), *The Blackwell Guide to Philosophy of law and Legal Theory* (Blackwell, 2006), 324-342

⁸⁷ Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001)

⁸⁸ Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006), 165

For further authors who cite a similar concern see: Brian Leiter, ‘Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis’ in Jules Coleman (ed), *Hart’s postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001) and Nicos Stavropolous, ‘Harts Semantics’ in Jules Coleman (ed), *Hart’s postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001)

⁸⁹ Brian Bix, ‘Conceptual Questions and Jurisprudence’ (1995) 1 (4) *Legal Theory* 465

⁹⁰ Andrew Haplin, *Reasoning with Law* (Bloomsbury Publishing, 2001)

⁹¹ *ibid* n 89 at 467

⁹² Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 3rd edition, G. E. M. Anscombe (trans.), 1953-1958)

cease to exist and a new practice (game) takes its place? This is an important question for legal theorists to consider, especially if we accept that our conceptual theories are supposed to capture our practices with at least some degree of accuracy.⁹³

The term ‘conceptual analysis’ doesn’t refer to a single approach, but rather refers to a range of possible methodologies. Therefore any evaluation of the role of conceptual analysis in law must start with this recognition and identification of the wide variety of these possible analyses. At least two principal forms of conceptual analysis can be identified in philosophy of law, one ‘describes’ what concepts are like and the other ‘prescribes’ how they should be understood (it is this latter form of conceptual analysis that emphasises of the normative nature of law is chiefly to be found).⁹⁴ Descriptive analysis ‘attempts to mirror or model the external reality of some phenomena’⁹⁵ and has been a prominent form of legal analysis. It is the style of conceptual analysis undertaken by H. L. A. Hart (one of its most notable proponents) who is the subject of chapter six. In the *Postscript* he characterised his theory of law as, *inter alia*, ‘descriptive sociology’:

My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect.... My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.⁹⁶

Hart’s choice of conceptual analysis has received considerable attention, with many commentators questioning whether his inclusive legal positivism (or soft positivism) can be both descriptive and morally neutral and this is in turn indicative of the criticism

⁹³ I return to Wittgenstein’s work and the influence of his ideas on rule-following in the final section of this chapter.

⁹⁴ Aaron J. Rappaport, ‘On the Conceptual Confusions of Jurisprudence’ (2014) 7 *Washington University Jurisprudence Review* 77, 79. Aaron Rappaport identifies four primary kinds of conceptual analysis used within legal theory - intuitive, empirical, categorical and contingent – and these can be distinguished based on their theoretical goals.

⁹⁵ *ibid* at 82

⁹⁶ H. L. A. Hart, ‘The Postscript’ in *The Concept of Law* (Oxford University Press, 2nd edition, 1994), 239-240

that descriptive theories of law have received.⁹⁷ As Jules Coleman, another prominent legal positivist, notes ‘there is no issue more prominent in the recent literature than the dispute between the proponents of normative and descriptive jurisprudence.’⁹⁸ This dispute between normative and descriptive jurisprudence is part of a wider challenge towards the appropriateness of conceptual analysis within law and philosophy. Brian Bix cautions that we need to re-evaluate the role of conceptual analysis in philosophy of law: ‘to determine whether conceptual analysis is appropriate for legal philosophy (or for any area of philosophy); whether, even if appropriate, it is sufficient (or needs supplementation by moral evaluation); and whether, even if appropriate and sufficient, its objectives and achievements are substantial.’⁹⁹ It is not the primary aim of my thesis to defend conceptual analysis in law (or philosophy), but by demonstrating the usefulness of thick and thin in legal conceptual analysis this thesis offers renewed interest in conceptual analysis (as it has done within philosophy) as an appropriate enterprise for philosophy of law.

This section has shown the fundamental importance of concepts and conceptual analysis to both philosophy and philosophy of law, the ground being covered to demonstrate the significance of my thesis for both disciplines. This thesis follows in the footsteps of Bernard Williams who suggested that traditional jurisprudence could be used by philosophers to consider whether it is philosophy that could learn something new from legal practices regarding the nature of concepts.¹⁰⁰

⁹⁷ I return to Hart’s theory and his critics in my legal theory chapter (six) where I use Hart’s work as a focal point for my discussion of the usefulness of thick and thin concepts in illuminating the nature of law (and therefore legal theory).

⁹⁸ Jules Coleman, ‘Methodology’ in J. Coleman, S. Shapiro and K.E. Himma (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 312

⁹⁹ *ibid* at 5

The caution Bix shows here contrasts with his earlier work which recognised the importance of conceptual inquiries in maintaining a structure for meaningful discussion to take place within. see note 89 at 469

¹⁰⁰ Bernard Williams, ‘Afterword What Has Philosophy to Learn from Tort Law?’ in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995)

4 - Distinguishing between different kinds of concept.

Within both philosophy and philosophy of law conceptual analysis has led to the distinction between different kinds of concepts.¹⁰¹ One of the most basic and fundamental distinctions is between ‘general’ concepts and ‘specific’ concepts.¹⁰² The more specific a concept the smaller its extension and the longer its list of necessary and sufficient features.¹⁰³ As with any distinction defining and constructing the distinction often leads to disagreement (such as the problems discussed earlier relating to conceptual analysis and definitions). For example even if the nature of ‘general’ and ‘specific’ as distinguishing categories can be agreed upon there may be disagreement regarding which category certain terms fall under (disagreements of classification).

Centralism and Non-Centralism.

In the late 1980’s a significant development concerning conceptual analysis lay in Susan Hurley’s introduction of the terms ‘centralism’ and ‘non-centralism’.¹⁰⁴ Hurley defines centralist accounts as those which take the general concepts in some category to be conceptually prior to and independent of the specific concepts: ‘The general concepts, such as *right* and *ought*, are taken to be conceptually prior to and independent of the specific concepts, such as *just* and *unkind*.’¹⁰⁵ Non-centralism rejects the conceptual priority attributed to general concepts: ‘Instead it may take the identification of discrete specific values such as justice and kindness as a starting point, subject to revision, and give an account of the relationships of interdependence

¹⁰¹ ‘Kinds’ refers to the identification and distinction of concepts based on their conceptual content, and categorizing or grouping contents with similar ‘kinds’ of content together. Heidi Feldman (see chapter seven) uses the phrase ‘evaluative taxonomy’ to refer to the same process (grouping concepts together that share similar evaluative content).

¹⁰² These terms are used with their standard dictionary definition they are not technical philosophical terms. The distinction between thick concepts and thin concepts is just one possible way of distinguishing between concepts. For example both philosophy and law distinguish between technical and non-technical terms. See Gilbert Ryle for an ordinary language philosophy discussion of this distinction. Gilbert Ryle, ‘Ordinary Language’ in *Collected Essays 1929-1968* (Routledge, 2009)

¹⁰³ This is the fundamental premise of Gilbert Ryle’s distinction between thick and thin description, I address this in the final chapter of my thesis in relation to legal education and caselaw.

¹⁰⁴ Susan Hurley is another theorist who was influenced by Wittgenstein on concepts and her work is another prime example of the overlap between meta-ethics and legal theory.

¹⁰⁵ Susan Hurley, ‘Objectivity’ in *Natural Reasons Personality and Polity* (Oxford University Press, 1992), 11. The orthodox account of the distinction between thick and thin starts with this same idea that there are some concepts that are more specific and some that are more general.

between the general concepts and specific reason-giving concepts.¹⁰⁶ Distinguishing between concepts then raises the question: which concept is prior?¹⁰⁷

Centralism and non-centralism applies to concepts in general - they are not specific to ethics or law¹⁰⁸ - although they have been utilised within these two fields.¹⁰⁹ When applied to ethics and law the reason-giving (normative) content of such concepts becomes of central importance:

On a centralist view of reason-giving concepts, disagreement is located in some general evaluative concept that is prior to and independent of specific reason-giving concepts. But on the non-centralist view that the general evaluative concepts are not prior to the specific and that claims about what ought to be done, all things considered, are claims about the relationships among specific values, if one creature does not possess the specific reason-giving concepts of another, then the minimal element of conceptual congruence that is a prerequisite of substantive disagreement between them may fail to obtain. Non-centralism claims that there are conceptual connections between claims about what ought to be done, all things considered, and a list of certain familiar specific values; the sense of ought that is a function of the specific values on the list can be used to challenge and revise views about the relationships among these values, but it cannot be used to endorse an entirely unfamiliar list. Thus non-centralism threatens to deprive us of a sense in which to disagree about things we seem to want to disagree about.¹¹⁰

Conceptual disagreement is a common theme in conceptual analysis (not just within centralism/non-centralism),¹¹¹ and is not limited to discussions of conceptual priority,

¹⁰⁶ *ibid*

¹⁰⁷ Conceptual priority arises within any account that distinguishes between kinds of concepts. I return to conceptual priority later in this chapter and in relation to thick and thin concepts in the next two chapters. Conceptual priority also arises in discussions of legal concepts although this is not addressed in my thesis.

¹⁰⁸ Hurley cites centralism about colours and logical centralism as examples.

¹⁰⁹ Meta-ethical theories such as Cognitivism and Non-Cognitivism (I explain these in the next section of this chapter) can be classified as centralist or non-centralist. Ethical Naturalists in the late 20th and early 21st centuries used non-centralism to attack thick moral concepts and challenge the fact-value distinction.

¹¹⁰ Susan Hurley, 'Disagreement' in *Natural Reasons Personality and Polity* (Oxford University Press, 1992), 30. Hurley refers to Bernard Williams' discussion of the 'locus of disagreement' and I discuss Williams' ideas on disagreement in chapter four of my thesis. This is another example of the already existing connections between the legal and meta-ethical literature.

¹¹¹ With theorists such as Colin McGinn challenging the idea that people disagree about concepts. He argued it didn't make sense to talk in this way because they could only be characterized as talking about different concepts. Colin McGinn, *Wittgenstein on Meaning* (Basil Blackwell, Oxford, 1984), 146-147

it is of particular relevance to legal theory.¹¹² One famous example is the jurisprudential debate between H. L. A. Hart¹¹³ and Lon Fuller¹¹⁴ who offered opposing analyses of law with different underlying purposes. The purpose of Hart's analysis was the maximisation of clarity in legal discussion both in general and specifically regarding the moral evaluation of legal rules. Fuller offered a moral test for application of the term 'law' that was based partly on usage and partly on a view of law as a form of social ordering that could be contrasted with other forms of social ordering. The incompatibility therefore derives from their differing underlying purposes and their conception of what constitutes a legal system (and therefore LAW). Brian Bix argues that legal conceptual theories and their claims can only be evaluated in light of their underlying purposes¹¹⁵ but that many conceptual theories of law and conceptual claims fail to articulate their purposes, which often results in legal disagreement. The subject of legal disagreement arises again in chapter seven (in the context of Dworkin's use of thick and thin concepts), so the present discussion turns instead to a conception of *legal* centralism.

The application of centralism to general jurisprudence would seem to hold the general concept of law as prior to and independent of specific legal concepts and associated principles, as determined by specific legal practices; e.g. tort and contract. A centralist account of specific legal concepts (e.g. contract) would present its status as providing reasons for a legal decision in some way in terms of a general concept of law that is prior to specific legal concepts, principles and practices, perhaps in the manner of Hart's rule of recognition, in terms of endorsement of rules.

The opponent to legal centralism (i.e. non-centralism) would appear to require that you need to understand at least some of the specific legal concepts and practices to understand the general concept of law. In addition, recognition of certain substantive

¹¹² Conceptual disagreement is addressed throughout my thesis in relation to both meta-ethical concepts and legal concepts. Bix opines: 'Legal theory would be more clearly (and more deeply) understood if its issues and the writings of its theorists were approached through a focus on questions rather than answers. Once one sees that different theorists are answering different questions and responding to different concerns, one can see how these theorists are often describing disparate aspects of the same phenomenon, rather than disagreeing about certain simple claims about law.' Brian Bix, 'Overview, Purpose and Methodology' in *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition, 2012), 3

¹¹³ H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) *Harvard Law Review* 593

¹¹⁴ Lon. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 (4) *Harvard Law Review* 630

¹¹⁵ see note 83 at 25

principles as binding on courts is direct; it doesn't depend on recognition of some central reason-giving status, such as endorsement by the rule of recognition. A legal judgement that is backed by a rule of recognition may also be accountable to specific legal practices that haven't been validated by the master rule.¹¹⁶ Hurley's discussion of centralism and non-centralism is an important precursor to the application of the distinction between thick and thin concepts. It was accompanied by a discussion of conceptual contestability, to which the present discussion of her work is now directed.

Conceptual Contestability.

Both meta-ethics and law have adopted the distinction between uncontestable concepts and contestable concepts (in which there are varying levels of contestability).¹¹⁷ Conceivably, contestable concepts - those that wouldn't normally admit of alternative conceptions or substantive disagreement - are contrasted with essentially contestable concepts - whose meaning is always open to substantive disagreement or alternative conceptions. It is by reference to practices (such as legal practices) that we identify circumstances where contest is conceivable and locate such contested applications (such as the application of a particular legal rule (CONCEPT) in a legal case) on our spectrum from conceptual to substantive difference in order to identify the kind of disagreement present (e.g. conceptual or substantive disagreement). Often in law though the problem is that the scope of the category (such as LAW, or RIGHTS) is as contested as the meaning of the items that fit within that particular category (such as RAPE within the wider category of LAW).

The idea of an essentially contested concept was coined in print by W.B. Gallie.¹¹⁸ The term refers to the idea that there are some concepts whose meaning is always contested, yet these contested concepts and disagreements are intelligible nonetheless.

¹¹⁶ The above points are familiar to Ronald Dworkin's discussion of Hart's legal positivism in relation to 'hard cases'. According to Hart the validity of specific rules of law stems from their validation by the rule of recognition, which is accepted but not valid. Dworkin disagrees. I elaborate on this in chapter six. Hurley's work is relevant to my thesis because of its relation to both Hart and Williams, and because all accounts of thick and thin concepts utilise her distinction between 'specific' concepts and 'general' concepts in some way.

¹¹⁷ Wittgenstein's influence on both the meta-ethical and legal discussions of conceptual disagreement can be seen in relation to the idea of conceptual contestability. Wittgenstein's thoughts on cultures different to our own involve scenarios of uncontestable or conceivably contestable concept application.

¹¹⁸ W. B. Gallie 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167. Gallie also considered the application of this idea to aesthetics, see: W. B. Gallie, 'Art as an Essentially Contested Concept' (1956) 6 (23) *The Philosophical Quarterly* 97. It has been used by many of the theorists I cite, such as Hurley: see note 110 at 46-7

Gallie is keen to show that the disagreements surrounding these concepts are rational. The idea of an essentially contested concept (ECC) is popularly cited in academic disciplines outside philosophy, such as the social sciences. It seems to be able to ‘explain, rather than explain away, complex substantive disagreements while not demanding controversial ontological commitments’ oppines Bix.¹¹⁹ Many legal concepts have been cited as ECC’s e.g. RAPE,¹²⁰ THE RULE OF LAW,¹²¹ and THEFT.¹²²

The kinds of disputes and disagreements Gallie is interested in are those where two disputants are arguing over the meaning of a concept. For example disputant A argues that a particular example is an example of concept X, whereas disputant B disagrees. This dispute cannot be settled by recourse to strict logic, empirical evidence or language analysis. He uses the example of two people debating whether a picture is a work of art, as in this case there is ‘an evident disagreement as to – and the consequent need for philosophical elucidation of – the proper general use of the term “work of art”.’¹²³ Gallie identifies seven necessary conditions for a concept being essentially contested:

- 1) In order for a concept to be essentially contested it ‘must be appraisive in the sense that it signifies or accredits some kind of valued achievement.’¹²⁴
- 2) ‘This achievement must be of an internally complex character, for all that its worth is attributed to it as a whole.’¹²⁵

¹¹⁹ See note 89 at 469; see also Jeremy Waldron, ‘Vagueness in Law and Language: Some Philosophical Issues’ (1994) 82 *California Law Review* 509, 526

Andrew Haplin offers an alternative analysis of ECC’s arguing that what ECC’s capture is value pluralism (this can be moral or aesthetic), but rather than being the product of conceptual analysis this value pluralism exerts an external influence over the use of the concept; ‘what is contested is not strictly what the concept should be but what value should be selected to fill out an element found within the concept.’ Andrew Haplin, ‘Concepts, Terms and Fields of Enquiry’ (1998) 4 *Legal Theory* 187, 203

¹²⁰ Eric Reitan ‘Rape as an Essentially Contested Concept’ (2001) 16 (2) *Hypatia* 43

¹²¹ Jeremy, Waldron ‘Is the Rule of Law an Essentially Contested Concept (in florida)?’ (2002) 21 (2) *Law and Philosophy* 137

¹²² This can also be a problem for legislators Haplin uses the example of the Theft Act: ‘it is arguable that the Criminal Law Revision Committee in making proposals for the definition of theft enacted in the Theft Act 1968 made exactly the mistake of assuming a uniform standard of dishonesty in society where in fact a plurality existed, and so unwittingly provided a contestable concept of dishonesty in the definition of theft.’ See note 119 Haplin at 204. See: A. Halpin, ‘The Test for Dishonesty’ (1996) *Criminal Law Review* 283

¹²³ W. B. Gallie ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167

¹²⁴ *ibid* at 171

Gallie only has positive connotations of appraisiveness in mind, but it could just as easily apply to concepts that indicated something deemed a failure or un-worthywhile, so this correction needs to be considered.

¹²⁵ *ibid* at 171-172

3) '[a]ny explanation of its worth must therefore include reference to the respective contributions of its various parts or features;....' Different interpretations can privilege different parts, 'the accredited achievement is initially variously describable,' but any explanation or analysis of the ECC would have to pay attention to all these parts (although different rival interpretations might privilege different parts within the whole).¹²⁶

4) 'The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstance; and such modification cannot be prescribed in advance. For convenience I shall call the concepts of any such achievement "open" in character.'¹²⁷ Gallie refers to this idea again when he indicates the achievement an ECC accredits has a 'persistently vague character'.¹²⁸

5) The disagreeing parties both contend that their view regarding the concept is correct, but 'each party recognizes the fact that its own use of it is contested by those of other parties, and that each party must have some appreciation of the different criteria in the light of which other parties claim to be applying the concept in question.'¹²⁹

6) 'The derivation of [an ECC] from an original exemplar whose authority is acknowledged by all contestant users of the concept.'¹³⁰ This allows Gallie to highlight a feature of disagreement (later emphasised by Dworkin) – that they are in genuine disagreement about the concept because they agree on paradigm cases, hence the disagreement cannot be put down to talking past each other or multiple concepts.¹³¹

By this Gallie means that the attribution of the ECC in question is really a function of different things which are part of that thing as a whole.

¹²⁶ *ibid* at 172

With regards to criteria two and three these seem to be very inclusive, according to these criteria non-atomistic concepts could qualify as complex, and this challenges the work that the label ECC can do.

¹²⁷ *ibid*

¹²⁸ *ibid* at 173

It's a social construct not just a function of stipulation. This is open to modification because of the context so it has to have a persistently vague character, so as to decide whether to ascribe the concept due to changing circumstances.

¹²⁹ *ibid* at 172

It is unclear why such concepts would be essentially contested, rather than contested concepts.

¹³⁰ *ibid* at 180

¹³¹ It is interesting how he moves between the phenomena and the philosophy of language, in criteria six he identifies that it is meaningful disagreement about the same phenomena that he is interested in, because they agree on paradigmatic cases. This leads me to question whether Gallie is really interested in which concepts are ECC's or disagreement.

7) ‘the probability or plausibility...of the claim that the continuous competition for acknowledgement as between the contestant users of the concept, enables the original exemplar’s achievement to be sustained and/or developed in optimum fashion.’¹³²

ECC’s have received considerable attention across many disciplines,¹³³ and Gallie after his initial discussion of ECC’s considered their application to art.¹³⁴ The RULE OF LAW is an example of a legal concept that has received attention by legal scholars addressing the topic of ECC’s in law.¹³⁵ There is a wealth of literature on ECC’s that analyses the usefulness of the distinction and whether it holds up in practice. It is not the details of this literature that are useful (to my thesis) but the context of the idea ‘ECC’ in relation to thick and thin concepts and its prominent recognition by both meta-ethicists and legal theorists that is useful. Consideration of ECC’s as a supplement to the literature on thick and thin concepts provides an early indication of the potential usefulness of thick and thin for law: for example, both ECC’s and thick/thin concepts could feature usefully in legal discussions of conceptual disagreement and conceptual agreement, both of which are key to understanding and explaining legal reasoning.

¹³² *ibid* at 180

There needs to be a continuous acknowledgement that the ECC relates to the paradigmatic case and condition six and seven are important because they rule out certain kinds of disagreements, such as those where the two disputants are talking past each other and highlight the specific kinds of disagreement Gallie is interested in. Those where there is a dispute, ‘where the common word stands for the same concept, but where there is a dispute as to exactly what the concept stands for and which examples fall under it. This dispute cannot be resolved with patient analysis if what one is after is either some victor or some realisation that there is no dispute at all. No one side will emerge as having the definitive definition of the concept at issue.’ *ibid*

Conditions six and seven also put restraints on the current usage of the concept. Condition seven provides a link to current use by ensuring that the concept users still care about the concepts exemplar and conceive of themselves as following the exemplars tradition, whereas condition six provides a link to previous use and derivation.

¹³³ C. McKnight, ‘Medicine as an Essentially Contested Concept’ (2003) 6 (23) *Philosophical Quarterly*, 97; S. A. Merrill, ‘?person? as Essentially Contested Concept in the Commonwealth of Discourse’ (1992) 23 (4) *Metaphilosophy* 363; Adaeze Okoye, ‘Theorising Corporate social Responsibility as an Essentially Contested Concept: Is a Definition Necessary?’ (2009) 89 (4) *Journal of Business ethics* 613; Andrew Mason, ‘On Explaining Political Disagreement: ‘The notion of an Essentially Contested Concept’’ (1990) 33 (1) *Inquiry* 81

¹³⁴ W. B. Gallie, ‘Art as an Essentially Contested Concept’ (1956) 6 (23) *The Philosophical Quarterly* 97

¹³⁵ For example see: David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, ‘Essentially Contested concepts: debates and applications’ (2006) 11 (3) *Journal of Political Ideologies* 211; and Kenneth M. Ehrenberg, ‘Law is not (best considered) an essentially contested concept’ (2011) 7 (2) *International Journal of Law in Context* 209

Gallie's ECC's highlight one area where thick and thin concept theorists and legal theorists have already begun to work together.¹³⁶ Simon Kirchin and Stephen Pethick challenge the appraisive nature of ECC's - they worry that Gallie's notion of appraisive is not given enough discussion or defence, and as such can be interpreted very liberally - a liberal membership policy that weakens the significance of labelling a concept an ECC.¹³⁷ Placing constraints on the criterial application of appraisive would restrict which concepts would be classed as ECC's and therefore preserve its theoretical significance, but they worry that this then fails to capture the particular kind of disagreements that Gallie was recognising: 'In short, when explaining agreement and disagreement it just seems better to work with some account of concepts that wears its broad application on its sleeve (such as the concept-conception distinction).'¹³⁸ Traditionally law favoured the concept-conception distinction over the distinction between thick and thin concepts.¹³⁹ A small group of legal theorists have begun to challenge the concept-conception distinction,¹⁴⁰ and my thesis continues this challenge by asserting the usefulness of thick and thin concepts in defending and promoting the role of conceptual analysis in legal theory and legal education.

¹³⁶ Thomas Perry suggests that Gallie's idea of essentially contested concepts could be applied to Ronald Dworkin's discussion of legal discretion (he notes Dworkin never actually refers to essentially contested concepts or to Gallie) although he concludes that it is insufficient on its own to defend Dworkin's 'right answer thesis'. See: Thomas D. Perry, 'Contested Concepts and Hard Cases' (1977) 88 (1) *Ethics* 20.

¹³⁷ Simon Kirchin and Steve Pethick, 'The Appraisive Nature of Essentially Contested Concepts' currently under revision.

¹³⁸ *ibid* at 4

In contrast to their concerns, Debbie Roberts argues that 'a concept being evaluative is sufficient for it being essentially contestable, though it may not be necessary, there may be non-evaluative concepts that are essentially contestable.' Debbie Roberts, 'It's Evaluation only Thicker' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 89

¹³⁹ Dworkin in particular favoured the concept-conception distinction in his earlier work see: Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) and Ronald Dworkin, *Taking Rights Seriously* (Duckworth, new impression with a Reply to Critics, 2005); but in his more recent work he has acknowledged the use of the distinction between thick and thin concepts to capture a similar phenomena, see: Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011)

¹⁴⁰ David Enoch and Kevin Toh, 'Legal as a Thick Concept' in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013); Heidi Li Feldman, 'Appellate Adjudication as Conceptual Engineering' in Graham Hubbs & Douglas Lind (eds), *Pragmatism, Law and Language* (Routledge, 2014); Heidi Li Feldman, 'The Distinctiveness of Appellate Adjudication' (2012) 5 *Washington University Jurisprudence Review* 61; Heidi Li Feldman, 'Blending Fields: Tort Law, Philosophy and Legal Theory' (1998) 49 *South Carolina Law Review* 167; Heidi Li Feldman, 'Objectivity in Legal Judgment' (1994) 92 (5) *Michigan Law Review* 1187; J. E. Penner, 'Legal reasoning and the authority of law' in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003); J. E. Penner, 'Common Law Cognition and Judicial Appointment' (2001) 38 *Alberta Law Review* 683; John Finnis, *Reason in Action: collected essays volume I* (Cambridge University Press, 2011); Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1992); Lawrence B. Solum & Linghao Wang, 'Confucian Virtue Jurisprudence' in Amalia Amaya & Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing, 2013)

Summary.

So far this chapter has established that there are already existing connections between law and philosophy - many of the core concerns and philosophical issues associated with concepts and conceptual analysis are shared by both law and philosophy - these same core concerns and philosophical issues have also gained the attention of early meta-ethicists and later thick and thin concept theorists (some of the terminology has changed but the fundamental substantive ideas remain the same).¹⁴¹

5 - Meta-ethical analysis prior to thick and thin.

Occupation with thick and thin ethical concepts presently amounts to only a very small part of meta-ethical enquiry, and to understand these two terms it is important to first understand that they are part of a wider meta-ethical discussion of ethical concepts that was originally captured by the terms ‘cognitivism’ and ‘non-cognitivism’ which in turn preceded the terms ‘thick meta-ethical concept’ and ‘thin meta-ethical concept’ (it was these ideas that thick and thin theorists were developing and redefining). Many of the theorists and core concerns cited below are heavily referred to by the thick and thin concept theorists discussed in the next chapter and by Williams in chapter 4, but interestingly not by the wider literature on thick and thin concepts that addresses non-ethical concepts.¹⁴² This presages one of the criticisms that I make of the legal literature on thick and thin identified in chapter five of my thesis – as legal theorists seem to treat Williams’ work on thick concepts as the starting point of thick concepts, with the meta-ethical literature prior to Williams’ ELP is rarely cited. However, as we shall see, this isolates Williams’ work and removes important contextual information and background knowledge from consideration in the legal scholarship. My argument in the later chapter will show that many of the mistakes made by the legal theorists regarding Williams could be avoided through better understanding of the literature that preceeded the coinage in print of the terms ‘thick’ concept and ‘thin’ concept. The

¹⁴¹ I am referring to those meta-ethicists writing before the coinage of the terms ‘thick’ and ‘thin’ ethical concept such as John McDowell, R. M. Hare, Allan Gibbard and Simon Blackburn, although due to the infancy of meta-ethics many of these theorists later wrote on thick and thin ethical concepts. The rest of this chapter demonstrates that much of early meta-ethics discussed ideas that are now captured by the language of thickness and thinness.

¹⁴² Those theorists who were first writing about thick and thin concepts such as Bernard Williams, John McDowell, Simon Blackburn and Allan Gibbard were all originally writing about cognitivism and non-cognitivism prior to the coinage in print of thick concepts.

remainder of this chapter and the next outlines the relevant literature but should not be construed as a chronology of the terms thick and thin, despite their subject matter being the meta-ethical literature before and after the introduction of the specific terms themselves.

At the beginning of this chapter attention was drawn to 20th century analytic philosophy's turn towards language and meta-ethicists were no exception to this because they wanted to better elucidate the nature of ethical concepts and ethical propositions. Meta-ethics (the metaphysics of ethics) asks questions about the metaphysical nature of our ethical concepts and to answer these questions often looks to the language employed. From this period there were and remain two principal approaches to ethical propositions and these can be characterised as cognitivist and non-cognitivist.¹⁴³ Cognitivists claim that ethical propositions are expressions about the way the world is or ought to be and they are therefore capable of truth or falsity (truth-aptness). It is important to note that although cognitivists believe that ethical propositions are capable of being truth-apt this does not commit cognitivists to believing that they can happen to be or are always true.¹⁴⁴ It is perfectly consistent with cognitivism to hold that a (all) moral proposition(s) are false.¹⁴⁵

Non-cognitivism denies the propositional nature of moral claims and therefore their ability to be truth-apt; that is, despite appearing to be 'about' statements (propositions) they are actually expressions of emotions or belief states. According to the non-cognitivist, despite appearances there is no ethical object for cognition (there is no cognitive object being described) as what is being described is really an emotion or

¹⁴³ There are many ways to be cognitivist or non-cognitivist so within the meta-ethical literature there are many ethical positions, for example expressivism and non-projectivism are forms of non-cognitivism and sensibility theorists or realists are forms of cognitivism. This particular area of philosophy is complex and distinguishing between the different forms of cognitivism and non-cognitivism requires a considerable amount of wider reading that is unnecessary and counter productive to my thesis. The discussion is constrained to the key texts and ideas that are necessary to demonstrate the core concerns that are useful to understanding thick and thin concepts. For introductory texts on these ideas within meta-ethics see: Alexander Miller, *An Introduction to Contemporary Metaethics* (Cambridge Polity Press, 2003); Andrew Fisher, *Metaethics an Introduction* (Acumen, 2011); and Simon Kirchin, *Metaethics* (Palgrave Macmillan, 2012)

¹⁴⁴ Cognitivism is a label for meta-ethical theories that hold to these two claims in some way; it doesn't dictate how to adhere to or accommodate these claims, that is left to a more precise version of cognitivism to decide.

¹⁴⁵ Error theory is a cognitivist form of moral nihilism and accepts the propositional nature of ethical statements but at the same time maintains that all ethical propositions are false (incapable of being truth-apt) therefore we are generally in error when we make a moral statement (if we assert its truth-aptness).

belief state – such as approval or disapproval towards something – and expressions such as these are not capable of truth-aptness (being true or false).¹⁴⁶

John McDowell's and Simon Blackburn's papers are some of the most well known in the classic debate between non-cognitivists and cognitivists.¹⁴⁷ The debate between McDowell and Blackburn (and therefore between non-cognitivism and cognitivism) regarding the nature of ethical language was an extension of philosophy's interest in language.¹⁴⁸ McDowell and Blackburn's debate takes place in the context of rule-following considerations found within Wittgenstein's later work,¹⁴⁹ and applies Wittgenstein's work on propositions to moral language. In light of this it is to Wittgenstein's work that exposition must now turn.

Wittgenstein and Ordinary Language Philosophy.

Wittgenstein's later work (post-*Tractatus Logico-Philosophicus*) saw philosophy as an activity in language – a practical activity in clearing up confusions that arise through misunderstanding language – as opposed to theory construction.¹⁵⁰ Rather than

¹⁴⁶ The labels cognitivism and non-cognitivism raise questions as to what is meant by characterising something as a 'belief' state or a 'non-belief' state. This is not addressed in this study, as it is not of direct relevance to thick and thin concepts.

¹⁴⁷ John McDowell, 'Non-Cognitivism and Rule-following' in Andrew Fisher and Simon Kirchin (eds), *Arguing about Metaethics* (Routledge, 2006); Simon Blackburn, 'Reply: Rule-Following and Moral Realism' in Andrew Fisher and Simon Kirchin (eds), *Arguing about Metaethics* (Routledge, 2006); John McDowell, 'Projection and Truth in Ethics' in Andrew Fisher and Simon Kirchin (eds), *Arguing about Metaethics* (Routledge, 2006)

For wider reading see: Simon Blackburn, *Ruling Passions* (Clarendon Press, 2000); Jonathon Dancy, *Moral Reason* (Blackwell, 1993); Allan Gibbard, *Wise Choice, Apt Feelings* (Clarendon Press, 1992); David McNaughton, *Moral Vision: An Introduction to Ethics* (Blackwell, 1988); Peter Railton, 'What the Non-Cognitivist Helps us See the Naturalist Helps us to Explain' in John Haldane and Crispin Wright (eds), *Reality, Representation and Projection* (Oxford University Press, 1993), 279-300; Peter Railton, 'Reply to David Wiggins' in John Haldane and Crispin Wright (eds), *Reality, Representation and Projection* (Oxford University Press, 1993), 315-28; David Wiggins, 'Cognitivism, Naturalism and Normativity' in John Haldane and Crispin Wright (eds), *Reality, Representation and Projection* (Oxford University Press, 1993), 329-38; David Wiggins, *Needs, Values, Truth* (Oxford University Press, 3rd edition, 1998)

¹⁴⁸ Cognitivists and non-cognitivists were leading the discussion regarding ethical propositions but in other areas of philosophy and in philosophy of law similar conversations were taking place regarding the nature of non-ethical propositions.

¹⁴⁹ Most notably his Philosophical Investigations: Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 3rd edition, G. E. M. Anscombe (trans.), 1953-1958)

See also: Saul Kripke, *Wittgenstein on Rules and Private Language* (Harvard University Press, 1984); Gerald Lang, 'The Rule-Following Considerations and Metaethics: 'Some False Moves'' (2001) 9 (2) *European Journal of Philosophy* 190; Alexander Miller and Crispin Wright (eds), *Rule-Following and Meaning* (Acumen, 2002)

¹⁵⁰ My discussion here is limited to a brief outline of the ideas that the cognitivists and non-cognitivists were responding to. For a more detailed analysis of Wittgenstein on language see: James Boogen, *Wittgenstein's Philosophy of Language: Some Aspects of Its Development* (Routledge, 2014); David

engaging with the polemics of specific theories and their opponents his method was to trace the source of such polemics through the confusions in the language employed by those theorists. As Ray Monk puts it in his well-known biography of the philosopher,

Philosophers, Wittgenstein believed, had been misled into thinking that their subject was a kind of science, a search for theoretical explanations of the things that puzzled them: the nature of meaning, truth, mind, time, justice, and so on. But philosophical problems are not amenable to this kind of treatment, he claimed. What is required is not a correct doctrine but a clear view, one that dispels the confusion that gives rise to the problem. Many of these problems arise through an inflexible view of language that insists that if a word has a meaning there must be some kind of object corresponding to it... Another closely related source of philosophical confusion, according to Wittgenstein, is the tendency to mistake grammatical rules, or rules about what it does and does not make sense to say, for material propositions, or propositions about matters of fact or existence.¹⁵¹

Wittgenstein's view changed from a conception of meaning as representation to one that looks to *use* in determining meaning. He urged philosophers when investigating 'meaning as use' that they must 'look and see' the wide variety of uses that are made of a particular word.¹⁵² He urges philosophers 'Don't think, but look'¹⁵³ and further to this enjoins that they don't look to the general, but look at particular cases of use. Wittgenstein concluded that 'far from being a truth-functional calculus, language has no universally correct structure – that is, there is no such thing as an ideal language. Instead, each language-system - be it a full-fledged language, a dialect, or a specialized technical language used by some body of experts – is like a game that functions according to its own rules.'¹⁵⁴ These rules cannot be stated - unlike the rules of grammar (which are descriptions of rules already existing in the practices of the linguistic community) – but are instead shown in the language practices of a particular community.

Blair, *Wittgenstein, Language and Information: "Back to the Rough Ground!": back to the Rough Ground! (Information Science and Knowledge Management)* (Springer, 2006); T. Binkley, *Wittgenstein's Language* (Martinus Nijhoff, 1973); Dale Jacquette, *Wittgenstein's Thought in Transition* (Purdue University Press, 1998)

¹⁵¹ Ray, Monk 'Ludwig Wittgenstein' (Britannica Encyclopedia, last updated 1st September 2015) <<http://www.britannica.com/biography/Ludwig-Wittgenstein>> accessed 2nd November 2014

¹⁵² Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 3rd edition, G. E. M. Anscombe (trans.), 1953-1958), 11

¹⁵³ *ibid* at 66

¹⁵⁴ Aaron Preston, 'Analytic Philosophy' (Internet Encyclopedia of Philosophy) <<http://www.iep.utm.edu/analytic/>> accessed 10 March 2015

Thus,

The “rules” of grammar are not mere technical instructions from on-high for correct usage; rather, they express the norms for meaningful language. Contrary to empirical statements, rules of grammar describe how we use words in order to both justify and criticize our particular utterances. But as opposed to grammar-book rules, they are not idealized as an external system to be conformed to. Moreover, they are not appealed to explicitly in any formulation, but are used in cases of philosophical perplexity to clarify where language misleads us into false illusions.¹⁵⁵

For the later Wittgenstein language is an intrinsically social phenomenon that cannot be studied in the abstract and grammar is situated within this activity.¹⁵⁶ ‘Language systems, or *language games*, are unanalyzable wholes whose parts (utterances sanctioned by the rules of language) have meaning in virtue of having a role to play – a *use* – within the total form of life of a linguistic community.’¹⁵⁷ The ‘forms of life’ are what enable language to function and this idea has led to competing readings of Wittgenstein; on the one hand language games are contingent and change depending on culture, context and history, and so on; and on the other hand they represent a ‘shared human behaviour’ that is common to humankind, allowing us, *inter alia*, to compare unknown languages.

Throughout *Philosophical Investigations* Wittgenstein returns to the concept of ‘language-games’ to explicate his thoughts on language. ‘Language-games’ point to the rule-governed character of language – there are not strict and definite rules for each individual language-game but there are general rules of convention that dictate the nature of this sort of human activity – it is in this sense that ‘language-games’ challenge definitional accounts of meaning (those that aim to provide final essential definitions of

¹⁵⁵ Anat Biletzki ‘Ludwig Wittgenstein’ (Stanford Encyclopedia of Philosophy, first published 8 November 2002, substantive revision 3 March 2014) < <http://plato.stanford.edu/entries/wittgenstein/>> accessed 1 March 2015

¹⁵⁶ Wittgenstein’s thoughts on ordinary philosophy are a departure from his earlier work on ideal language philosophy found in the *Tractatus Logicus Philosophicus*. His later views were mainly conveyed and spread through his teachings whilst lecturing at Cambridge and were posthumously collated in his *Philosophical Investigations*. My thesis draws on Wittgenstein’s later philosophy.

¹⁵⁷ see note 154

‘Language games’ is the name of the method of describing and imagining that Wittgenstein used to demonstrate his picture of language. Language games are social activities that use specific forms of language and by describing these he could demonstrate the countless ways that language is used in human interaction and that ‘the speaking of language is part of an activity, or a form of life’. Traditionally it was thought words referred to objects and a words meaning was this correspondence relation. Wittgenstein saw the meaning of a word as the use that is made of the word in ‘the stream of life’.

the thing in question).¹⁵⁸ Thus Wittgenstein rejects the idea that there is an essential core of meaning that is common to all uses of a particular word¹⁵⁹ and instead advances the thesis that ‘a complicated network of similarities overlapping and criss-crossing’¹⁶⁰ mark out a word’s use. ‘Family resemblance’ is used as a more suitable analogy for the connections between particular uses of words because these capture similarities of kind and demonstrate the lack of exact boundaries for the meaning (use) of a particular term.¹⁶¹ Wittgenstein’s influence and his importance in analytic philosophy is not the only reason for his inclusion here, for his work is of special significance to many of the theorists addressed within this dissertation, in particular Bernard Williams and H. L. A. Hart.

The influence of ordinary language philosophy (broadly, 1945-1965)¹⁶² is evident throughout the articles by McDowell and Blackburn.¹⁶³ They introduced many of the key ideas - such as disentangling¹⁶⁴ and shapelessness¹⁶⁵ – that remain central to the thick and thin concept literature in their earlier discussions of cognitivism and non-cognitivism. This thesis primarily focuses on thick and thin concepts, but cognitivism and non-cognitivism have been raised (albeit briefly) because they are important philosophical background and precursors to the distinction between thick and thin concepts, as we shall see (and sharpen) as my argument and exposition develops throughout subsequent chapters. Indeed, it is easier to understand the literature on thick

¹⁵⁸ It is here we can see Wittgenstein’s rejection of the classical account of concepts and conceptual analysis (I discuss these later in this chapter) that utilize necessary and sufficient conditions to provide criteria for definitions.

¹⁵⁹ Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 3rd edition, G. E. M. Anscombe (trans.), 1953-1958), 65

¹⁶⁰ *ibid* at 66

¹⁶¹ For a discussion of family resemblance see: Jeremy Waldron, ‘Vagueness in Law and Language: Some Philosophical Issues’ (1994) 82 *California Law Review* 509

¹⁶² There is some disagreement regarding the exact dates of the beginning of analytic philosophy and the various sub-movements within it, the dates I have used are those cited by the ‘Analytic Philosophy’ entry from the Stanford Encyclopedia of Philosophy. Ordinary Language Philosophy wasn’t dominant until after the second World War (hence 1945-1965) and most of the important publications within this field (with the exception of Gilbert Ryle) happened as the linguistic approach was losing popularity (from 1949 onwards).

¹⁶³ Ordinary language philosophy was developed by the Cambridge philosophers Ludwig Wittgenstein and John Wisdom and the Oxford philosophers Gilbert Ryle, John Austin (not to be confused with the 19th century legal positivist John Austin), Peter Strawson and Paul Grice.

¹⁶⁴ Both Cognitivism and Non-Cognitivism, and thick and thin concepts are ways of distinguishing concepts. By doing so they identify more than one kind of conceptual content and this raises the question how closely connected are these different kinds of content? Are they so closely connected that they are entangled or are they separate enough that they could be disentangled? At this stage in my thesis I provide only this brief summary of a complex issue, because it is more beneficial to explain this idea in the next chapter rather than here.

¹⁶⁵ ‘Shapelessness’ is an extension of the debate on ‘disentangling’ and will also be addressed in the next chapter. If it is possible to separate (disentangle) the conceptual content then this raises a further question: is this content intelligible once separated?

and thin concepts once it is understood that many of the theorists addressed in this thesis were instrumental in the development of both of these ways of looking at concepts (cognitivism/non-cognitivism and thick/thin concepts). The following chapter therefore primarily deals with thick and thin concepts, but where it is deemed relevant references will also be made to the meta-ethical literature on cognitivism and non-cognitivism because of the close association and overlap between the two advertised here.

6 – Conclusion.

This chapter has canvassed essential philosophical and some legal ground relating to concepts and conceptual analysis, which will be crucial in understanding my main thesis claim: that the distinction between thick and thin concepts is useful in law. Thick and Thin concepts are a development of the philosophical ideas relating to concepts and conceptual analysis covered in this chapter. Many of the same issues relating to our conceptual practices will therefore also arise in the next chapter, where I outline in more detail the nature of the distinction between thick and thin concepts. This chapter and the next two are preparatory chapters that equip the reader with the necessary understanding of the philosophical (in particular meta-ethical) ideas and literature that my thesis draws on through its legal application of thick and thin.

Chapter Three: 'Thick' Concepts and 'Thin' Concepts

1 – Introduction.

This chapter addresses the wealth of literature on thick and thin concepts that can be found within meta-ethics.¹⁶⁶ Despite the huge amount of disagreement regarding thick and thin concepts, all the theorists agree that thick concepts are more specific and thin concepts are more general.¹⁶⁷ There are a variety of formulations of thick and thin concepts, and many of these formulations differ significantly in picking out content in relation to thick and thin. Some of these formulations identify the differing content (and the concepts) as depending on a difference of kind, and, others disagree.

One of the reasons why there are so many different accounts of thick and thin concepts (even those theorists who use the same terms e.g. ‘evaluative’ and ‘descriptive’ when

¹⁶⁶ Allan Gibbard and Simon Blackburn, ‘Morality and Thick Ethical Concepts’ (1992) 66 *Proceedings of the Aristotelian Society* 267; Allan Gibbard, *Wise Choice, Apt Feelings* (Clarendon Press, 1992); Bernard Williams, *Ethics and the limits of Philosophy* (Routledge Classics, 2011); Christine Tappolet, ‘Through thick and thin: ‘good’ and its determinates’ (2004) 58 (2) *Dialectica* 207; Debbie Roberts, ‘It’s Evaluation only Thicker’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Edward Harcourt and Alan Thomas, ‘Thick Concepts, Analysis, and Reductionism’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Eric Wiland, ‘Williams on Thick Ethical Concepts and Reasons for Action’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, 2004); John McDowell, ‘Critical Notice of Bernard Williams’ *Ethics and the Limits of Philosophy*’ (1986) 95 *Mind* 377; Jonathon Dancy, ‘Practical Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Jonathon Dancy, ‘In Defense of Thick Concepts’ (1995) 20 (1) *Midwest Studies in Philosophy* 263; Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Matti Eklund, ‘Evaluative Language and Evaluative Reality’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Michael Smith, ‘On the Nature and Significance of the Distinction between Thick and Thin Ethical Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Nick Zangwill, ‘Moral Metaphor and Thick Concepts: What Moral Philosophy Can Learn from Aesthetics’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Pekka Vayrynen, ‘Thick Concepts and Variability’ (2011) 11 (1) *Philosophers Imprint* 1; Pekka Vayrynen, *The Lewd, the Rude and the Nasty: A Study of Thick Concepts in Ethics* (Oxford University Press, 2013); Pekka Vayrynen, ‘Essential Contestability and Evaluation’ (2014) 92 *Australasian Journal of Philosophy* 471; Pekka Vayrynen, ‘Shapelessness in Context’ (2014) 48 *Nous* 573; Pekka Vayrynen ‘Thick Concepts and Underdetermination’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Pekka Vayrynen, ‘Thick Concepts: Where’s Evaluation?’ in R. Shafer-Landau *Oxford Studies in Metaethics volume 7* (Oxford University Press, 2012); Pekka Vayrynen, ‘Objectionable Thick Concepts in Denials’ (2009) 23 *Philosophical Perspectives* 439; Philippa Foot, ‘Moral beliefs’ (1958) 59 *Proceedings of the Aristotelian Society* 83; Philippa Foot, *Virtues and Vices* (Oxford University Press, 2002); Samuel Scheffler, ‘Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy’ (1987) *The Philosophical Review* 96; Simon Blackburn, ‘Disentangling Disentangling’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Simon Kirchin, ‘Thick Concepts and Thick Descriptions’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Timothy Chappell, ‘There Are No Thin Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); T. M. Scanlon, ‘Thickness and Theory’ (2003) 100 (6) *The Journal of Philosophy* 275; Valerie Tiberius, ‘Well-being, Wisdom, and Thick Theorizing: on the Division of labor between Moral Philosophy and positive Psychology’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013)

¹⁶⁷ This study addresses ethical and legal concepts that can be categorized as thick or thin concepts, but it is important to note that the distinction between thick and thin concepts can apply to concepts within any field. It is not specific to meta-ethics, but as this is where the distinction was first coined the majority of the literature is meta-ethical and the examples used in this chapter will be ethical terms.

referring to the conceptual content within these concepts do not all offer the same, uniform account) is that at present there is yet to be an account of thick and thin concepts that can satisfactorily distinguish the concepts from each other, convincing even a majority of meta-ethicists that this is the best account of these concepts.¹⁶⁸

This chapter addresses two questions that successfully iterate the key aspects of the literature on thick and thin concepts that are most relevant to a legal application of thick and thin.

Q 1 What is the nature of the content identified by the distinction between thick and thin concepts?

Q 2 Is the distinction between thick and thin concepts based on a distinction between two different *kinds* of concept?

It will not be possible to address all the meta-ethical literature on thick and thin concepts, or even all the literature that relates to the above two questions, and therefore my discussion is limited to those theorists (and their formulations) that best demonstrate the aspects of the literature that are relevant for a legal application of thick and thin, and that equip the reader with the necessary knowledge to understand Williams' formulation as his is the theory of thick concepts that will serve as a platform for consideration of issues throughout the remainder of this thesis (the specific detail of his formulation is discussed in the next chapter). Therefore the aim

¹⁶⁸ Simon Blackburn remains to be convinced that there are thick concepts as meta-ethicists envisage them: 'I do not think there are any thick concepts, as these have been understood. There may be concepts that are encrusted with the thickest of cultural deposits, but I shall urge that this is a different matter, and indeed one that subverts the normal notion of thickness. Furthermore, although there are some thick words, they are of no great importance to the theory of ethics. And in fact, there are many fewer thick words than philosophers have been prone to suppose.' Simon Blackburn, 'Through Thick and Thin' in Allan Gibbard and Simon Blackburn, 'Morality and Thick Ethical Concepts' (1992) 66 *Proceedings of the Aristotelian Society* 285. His views regarding this are outlined in his debates with John Mc Dowell in: Steven H. Holtzman & Christopher M. Leich (eds), *Wittgenstein To Follow a Rule* (Routledge & Kegan Paul, 1983), and in: Ted Honderich (ed), *Morality and Objectivity: A Tribute to J. L. Mackie* (Routledge & Kegan Paul, 1985). Timothy Chappell challenges the orthodox view of both thick and thin concepts. Regarding thin concepts he argues that 'there are no thin concepts or almost none. And those that there are, are like the higher-numbered elements in the periodic table, artefacts of theory which do not occur naturally, even once isolated, are unstable under normal conditions; they may have some theoretical interest, but we should expect far less of them than many theorists do.' Timothy Chappell, 'There Are No Thin Concepts' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 182. Regarding thick concepts, he doesn't think that the usual examples of derogatory terms – 'Yid', 'Kraut' and 'Limey' are thick concepts. Instead he claims they come into being when one group wants to outgroup some other group by calling them a jeering name.

of this chapter is to establish the philosophical grounding and basic understanding of ideas that are central to the study of thick and thin (and so to my thesis), which will also aid in better understanding the point of view presented by Williams. This is important, because as I argue in the next two chapters he is widely misunderstood. Leaving Williams aside for now, this chapter first addresses matters pertaining to conceptual content.

2 - Conceptual Content.

As noted at the start of this chapter it is not just that there are many possible accounts of thick and thin concepts, it is that many of these accounts pick out significantly different content in relation to thick and thin and therefore operate with different formulations of the distinction. This is why the first of the two key questions addressed in this chapter focuses on the conceptual content picked out by the various theorists writing on thick and thin concepts.

Q 1 What is the nature of the conceptual content identified by the distinction between thick and thin concepts?

The orthodox account picks out *evaluative* conceptual content and *descriptive* conceptual content as important to the distinction, though not all thick and thin theorists categorise the relevant conceptual content in this way.¹⁶⁹ For example, prescriptivists (as might be imagined) prefer to categorise the evaluative aspect as some form of prescription or demand that could be separated from the descriptive aspect (this latter element comprising the conceptual content).¹⁷⁰ Another option taken up in the literature is to class the evaluative aspect as normative content and distinguish

¹⁶⁹ Allan Gibbard adopts the same categorization of the conceptual content in a thick concept as the orthodox account – thick concepts contain a combination of both ‘evaluative’ and ‘descriptive’ content – but his theory of thick concepts arises accidentally, as a result of his treatment of moral terms in his: Allan Gibbard, *Wise Choices, Apt Feelings* (Oxford University Press, 1990). It is hard to describe Gibbard as a supporter of thick concepts because he explicitly notes that he finds thick concepts puzzling and that so far all the treatments he has seen strike him as failures.

¹⁷⁰ R. M Hare’s precriptivism is the most commonly referenced prescriptivist account in the literature on thick and thin concepts. See R. M. Hare, *The Language of Morals* (Clarendon Press, 1952). Hare never actually explicitly used the term ‘thick’ concept because his work like that of many other cognitivists and non-cognitivists predated the coinage of the terms ‘thick’ and ‘thin’ concept, but he was discussing the same conceptual phenomena.

between normative and non-normative conceptual content.¹⁷¹ Sometimes direct reference is made to the fact-value distinction (this predated the thick-thin distinction) in which the descriptive aspect of thick concepts is referred to as factual content and the evaluative aspect as value-laden content.¹⁷² Williams, whose formulation provides the test for my thesis, uses the terms ‘action-guidance’ and ‘world-guidedness’ to identify the conceptual content involved in thick and thin concepts (again, Williams’ formulation of thick and thin concepts is addressed in the next chapter).¹⁷³

At present the different ways of construing the conceptual content within thick and thin concepts identified above (evaluative and descriptive; prescriptive and descriptive; normative and non-normative; fact and value; action-guiding and world-guided) all seem to be problematic in some way, but as the orthodox account uses the terms evaluative and descriptive these terms are used when discussing thick and thin concepts both within this chapter and throughout this study (except when discussing Williams, or other theorists who identify the conceptual content differently). These terms also better facilitate a discussion of the various features of thick and thin concepts that have captivated the attention of meta-ethicists, because much of the meta-ethical literature on thick and thin concepts focuses on the problems associated

¹⁷¹ Simon Kirchin notes this option in his introduction to the edited collection of papers on Thick Concepts, see: Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013). There is a problem with construing this conceptual content as normative in nature though, because it is far from settled what normative content actually is, legal scholars often refer to law as being normative in nature because it influences us, provides reasons and is tied to action. Yet there are many ways these things can be achieved and many types of actions – physical and non-physical. In some ways it may be disadvantageous to assume that all thick and thin concepts contain normative content because it can be both too specific (exclude important conceptual content) and too vague (fail to usefully identify important aspects of the conceptual content) to really tell us anything accurate about thick and thin concepts.

¹⁷² Philippa Foot and Iris Murdoch both discussed the potential separability of fact and value in thick concepts, although they didn’t use the term ‘thick’ concept as their work occurred prior to Williams’ coinage in print of the term. See: Philippa Foot, ‘Moral beliefs’ (1958) 59 *Proceedings of the Aristotelian Society* 83; Iris Murdoch, ‘Vision and Choice in Morality’ (1956) 30 *Proceedings of the Aristotelian Society* 32; and Iris Murdoch, ‘Metaphysics and Ethics’ in D. F. Peters (ed), *The Nature of Metaphysics* (Macmillan, 1957), 59-75

¹⁷³ Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge Classics, 2011). Williams’ use of the terms ‘action-guiding’ and world-guided’ content has been widely criticised, and the following is an example of a criticism commonly levied against Williams. Whilst certain thick concepts seem to be more practical than others (e.g. ethical concepts), because they seem to be more overtly action-guiding or at least their action-guidance is more prominent, there are many thick concepts (both ethical and non-ethical) that are not used to guide action, even indirectly (e.g. aesthetic concepts). It therefore seems inappropriate to identify action-guiding content as one of the distinguishing features of thick concepts even if this action-guidance is loosely construed (even if ethical concepts are not required to provide direct reasons for action and it is sufficient that they often indirectly influence action). These ideas will be further elaborated upon in the next chapter.

with construing the conceptual content as evaluative and descriptive in nature.¹⁷⁴ This is hardly surprising as prior to the development of thick and thin concepts, cognitivists and non-cognitivists were concerned with the problematic nature of ethical concepts that seemed to possess both evaluative and descriptive content.¹⁷⁵

Within the literature on thick and thin concepts both evaluative and descriptive aspects of thick (and thin concepts) are problematic because there are two questions that remain unanswered within meta-ethics: what is descriptive content and what is evaluative content?¹⁷⁶ It is a concern that construing evaluation with sufficient flexibility (interpreting the term widely enough) to fit the majority of thick and thin concepts could then distort the very distinction the relevant theorists are trying to clarify; or again, that identifying thick and thin concepts as primarily or wholly evaluative in nature forces all thick and thin concepts to fit our preconceived notions of evaluative content. These are valid concerns especially as there is no reason to assume that all thick and thin concepts *per se* will be primarily or wholly evaluative, for different thick and thin concepts from different disciplines may behave differently.¹⁷⁷

¹⁷⁴ One reason that all of the various conceptual contents picked out by the theorists operating with this distinction may be problematic, is that the conceptual content within thick and thin concepts may involve a combination of the possible conceptual content identified. Simon Kirchin raises an interesting point that maybe what we need is an account that can recognise that the content may be one of many possibilities or a combination of those possibilities e.g. evaluative-cum-normative-cum-action-guiding. see note 171 at 6

¹⁷⁵ Many of the ethicists prior to the coinage of the term 'thick' ethical concept (such as cognitivists and non-cognitivists) were involved in intractable debates regarding the fact-value distinction and the nature of evaluative concepts. Hilary Putnam, 'The Analytic and the Synthetic' in H. Feigl and G. Maxwell (eds), *Minnesota Studies in the Philosophy of Science, Volume III*. (University of Minnesota Press, 1966), 358-397; Philippa Foot, 'Moral beliefs' (1958) 59 *Proceedings of the Aristotelian Society* 83; Iris Murdoch, 'Vision and Choice in Morality' (1956) 30 *Proceedings of the Aristotelian Society* 32; and Iris Murdoch, 'Metaphysics and Ethics' in D. F. Peters (ed), *The Nature of Metaphysics* (Macmillan, 1957), 59-75

These debates have continued now within the framework of thick and thin: Simon Blackburn for example has continued his critique of the fact-value distinction and now combined this with his critique of thick concepts: 'In the end I want to oppose the popular idea that a proper understanding of thickness tells us surprising things about ethical objectivity, and even perhaps undermines the fact-value distinction.' Simon Blackburn, 'Through Thick and Thin' in Allan Gibbard and Simon Blackburn, 'Morality and Thick Ethical Concepts' (1992) 66 *Proceedings of the Aristotelian Society* 285

¹⁷⁶ Different theories of ethical language have tried to answer these two questions and consider how ethical terms (and phrases) appear to function. Hare's prescriptivism (which has already been noted in this chapter) is an example of one possible explanation of how ethical language functions.

¹⁷⁷ Consider for example law, this maybe one area where it might be better to acknowledge the strongly normative nature of legal concepts by identifying both normative and evaluative content as an important aspect of thick and thin legal concepts (although depending upon how the 'evaluative' content is construed, normative could be viewed as a type of evaluative content).

Evaluative conceptual content.

Most meta-ethicists are willing to grant that thick terms are *somehow* associated with evaluations, but this is where the agreement ends. The issue for debate is not *whether* but *how* thick terms are associated with evaluations (what exactly the nature of this association is).¹⁷⁸

The matter above picks out a particularly complex and fraught area in the literature on thick and thin concepts, but there are two principal viewpoints – pragmatic and semantic – that it is immediately helpful to acknowledge.¹⁷⁹ Supporters of the pragmatic view hold that the evaluative element is not found in a concept's content, but is rather found elsewhere,¹⁸⁰ whereas supporters of the semantic view hold that the evaluation is *conceptually entailed*.¹⁸¹ Part of the disagreement stems from an assumption that the evaluative content in thick concepts is associated with evaluative content in thin concepts in some manner.¹⁸² The semantic viewpoint infers the conceptual entailment of thin evaluation within thick concepts, whereas the pragmatic

¹⁷⁸ Blackburn, Vayrynen and Eklund have challenged the assumption that thick concepts have evaluative content at all. See: Simon Blackburn, 'Through Thick and Thin' in Allan Gibbard and Simon Blackburn, 'Morality and Thick Ethical Concepts' (1992) 66 *Proceedings of the Aristotelian Society*, 285; Pekka Vayrynen, 'Thick Concepts: Where's Evaluation?' in R. Shafer-Landau *Oxford Studies in Metaethics volume 7* (Oxford University Press, 2012); and Matti Eklund, 'What are Thick Concepts?' (2011) 41 *Canadian Journal of Philosophy* 25

¹⁷⁹ This study does not explore this aspect of the literature in depth as it is Williams' formulation that is investigated in more depth in the next chapter and serves as the exemplar in my study, but it is worth briefly expanding upon these two key viewpoints (pragmatic and semantic) as they will be mentioned again later in the thesis in chapters five through seven when addressing the legal theorists writing on thick and thin concepts.

¹⁸⁰ Debbie Roberts for example notes that pragmatists: 'argue that the evaluations that thick terms can be used to convey (or the evaluations "most closely associated" with thick terms) are located not in what is strictly *said* in an utterance employing a thick term but in some other aspect of what is communicated.' Debbie Roberts, 'It's Evaluation only Thicker' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 79

¹⁸¹ Brent Kyle offers a version of the Semantic View: 'Many thick concepts (if not all) conceptually entail evaluative contents.' Brent Kyle, 'How Are Thick Terms Evaluative?' (2013) 13 *Philosophers Imprint* 2. This maybe unappealing to many because philosophers such as Foot, Murdoch and Williams used thick concepts to undermine the fact-value distinction, but Kyle maintains that the semantic view can be reformulated in such a manner that would be consistent with their stance towards the fact-value distinction.

¹⁸² This leads to a related issue known as 'conceptual priority': if thick concepts are created out of an amalgam of thin evaluative content (the suggestion being that this evaluative content is the evaluative content from related thin concepts) and descriptive content; then are thin concepts conceptually prior to thick concepts (or alternatively can thick concepts be reductively analysed into a thin concept with additional descriptive content attached)? Alternatively if the descriptive content is viewed as the more important aspect then it could be argued that thick concepts are conceptually prior to thin concepts in virtue of their richer descriptive content.

viewpoint argues that there is no element of thin evaluation in the content of thick terms/concepts.¹⁸³

Theorists such as Jonathan Dancy argue that it is not enough that there is some evaluative and descriptive conceptual content present, it must also be the ‘right’ content and present in the ‘right’ way. If the evaluative or descriptive component is not present in the right way this affects the nature of the thick concept. Consider the example of ‘objectionable thick concepts’.¹⁸⁴ Objectionable thick concepts are concepts that embody values that ought to be rejected by everybody.¹⁸⁵ Identifying which values ought to be rejected and which concepts are objectionable thick concepts is extremely tricky and controversial.¹⁸⁶ This is reflective of a wider issue in the thick and thin concept debate concerning how we account for other cultures whose evaluative concepts differ from ours - if we cannot provide a logical justification for our conceptual divisions then how can we explain our concept application to outsiders and defend our claims as a form of knowledge - especially when they differ from other societies applications.¹⁸⁷

¹⁸³ Roberts offers a third view point ‘the inclusive view’, which rejects the orthodox view that to be evaluative as a matter of content a concept must have thin evaluative content. The inclusive viewpoint includes elements of both the content and pragmatic viewpoint, but argues that thick concepts are evaluative because they ascribe an evaluative property. Debbie Roberts, ‘It’s Evaluation only Thicker’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 80. Under the Inclusive View ‘evaluation drives the extension of thick terms.’ *ibid* at 81

¹⁸⁴ Pekka Vayrynen has argued that objectionable thick concepts and their use within certain contexts sheds light on the relationship between thick terms and evaluation, he thinks there is evidence that this relationship is not semantic (he uses objectionable thick concepts in his discussion of semantic and pragmatic viewpoints). Pekka Vayrynen, ‘Objectionable Thick Concepts in Denials’ (2009) 23 *Philosophical Perspectives* 439

¹⁸⁵ Blackburn advances a similar line of thought, he argues that thinking in terms of thick concepts does a disservice to ethics, it discourages critique and can obscure reprehensible evaluations and as such believing in them can make it likelier you will uncritically accept these evaluations. Blackburn uses the example of CUTE and thinks we should criticize it by using disentangling. Simon Blackburn, ‘Through Thick and Thin’ in Allan Gibbard and Simon Blackburn, ‘Morality and Thick Ethical Concepts’ (1992) 66 *Proceedings of the Aristotelian Society* 285

¹⁸⁶ Slurs are an important example, because it is controversial whether such terms should count as thick terms. Mark Richard argues for their inclusion as thick terms, others such as Dancy and Gibbard are hesitant. The lack of a clear definition of a thick term does not make it easy to determine whether slurs are examples of thick terms. See: Mark Richard, *When Truth Gives Out* (Oxford University Press, 2008), 14; Jonathon Dancy, ‘In Defense of Thick Concepts’ (1995) 20 (1) *Midwest Studies in Philosophy* 263, 264; and Allan Gibbard, *Thinking How To Live* (Harvard University Press, 2003)

¹⁸⁷ Williams’ work on thick ethical concepts is again relevant here, because his discussion of evaluative standpoint within thick concepts was the result of considering the philosophical problems associated with defending our thick ethical statements as a form of knowledge (this is addressed in the next chapter). This wider issue predates the literature on thick and thin concepts and has previously been discussed within the context of the debate between moral relativists and moral realists.

Williams (like many other cognitivists and non-cognitivists) was concerned with understanding the evaluative standpoint of thick and thin concepts (again, this is addressed in the next chapter in more detail), and the extent to which an outsider could grasp the evaluative community's thick concepts.¹⁸⁸ For now it is sufficient to note that Williams argues that one needs to know the appropriate evaluative standpoint of a thick term to know its extension and that the debate regarding this point concerns the role the evaluative content plays within thick and thin concepts in determining their extensions.¹⁸⁹ The problems regarding the nature of evaluative content and how this content is associated with the (thick or thin) concept in question is a prime example of the complex nature of evaluations, which intensifies when we start to consider how the descriptive and evaluative aspects of a thick concept combine.¹⁹⁰ As Fisher and Kirchin note, what unites all accounts of thick evaluative concepts is that they 'are those concepts and associated terms that in some fashion combine both some evaluative, attitudinative aspect with a descriptive, non-evaluative aspect in some

¹⁸⁸ This aspect of the literature draws on wider concerns within philosophy regarding concept mastery. Nick Zangwill is uncomfortable with this distinction between different ways of grasping concepts, claiming that 'full' grasp of a concept or meaning is a hypothesized state that there is no reason to believe in. Nick Zangwill, 'Moral Metaphor and Thick Concepts: What Moral Philosophy Can Learn from Aesthetics' Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 197-209. He is critical of theorists such as Peter Goldie and Adrian Moore, who claim that 'full' or 'proper' grasp of the concept implies an evaluation. See: Peter Goldie, 'Thick Concepts and Emotion' in Daniel Callcut (ed), *Reading Bernard Williams* (Routledge, 2008), 94-109 and Adrian Moore, 'Maxims and Thick Ethical Concepts' (2006) 19 *Ratio* 129

¹⁸⁹ An alternative way of discussing the issue is to distinguish outsiders from 'a fully-fledged concept user.' What we are trying to establish is the extent to which the outsider has to hold the exact same evaluations that the insider holds, to be able to understand the concept and its applications in the way that the insider does. This raises further questions though: does the outsider need to sincerely hold those evaluations; and do all insiders share the same evaluations such that there can be a single evaluative stance associated with that particular concept? The discussion normally begins by assuming that there is a single evaluative stance that can be identified as being specific to that particular cultures understanding of that specific concept, even if this is quite abstract and allows for additional individual differences. The distinction between outsiders and insiders concerns many practices, even those specific to a society such as law and it would seem to be too strict a requirement that you need to be an insider to a practice or a culture to be classed as sincerely holding the evaluations of the practice or culture. It would seem to imply that many of our communications are based on insincere adoptions of evaluations and therefore incomplete understanding of the concepts we are using. If something less is required to count as sincere then what mental state is required – pretence, imagination, appreciation etc? This does nothing to clarify the original issue in fact it may complicate it further, it may well be that different situations require different mental states to satisfy the requirement of sincerity. Different concepts will require different evaluative stances and this may require differing levels of sincerity. The more complex concepts will take longer to grasp, by both the outsiders and the insiders.

¹⁹⁰ Nick Zangwill worries that thick concepts often seem to lead to moral dogmatism and over confidence on the part of some philosophers who employ them. 'The step from (non-evaluative) fact to value is problematic and controversial, and not to be lightly skipped over, especially with the blithe assurance that doing so is part of the meaning of certain words or grasping certain concepts. This is a serious error, for we must not turn our face away from the perilous abyss between (non-evaluative) fact and value.' see note 188 Zangwill at 198. He challenges many other defenders of thick concepts (such as Foot and McDowell) for thinking that if moral judgments had descriptive content then they could be known in broadly empirical ways.

fashion.’¹⁹¹ These authors are deliberately vague in their description of the relationship between the evaluative and descriptive aspect of thick concepts, because theorists disagree regarding the nature of this relationship (the association between the evaluative and descriptive content).

3 – Evaluative and descriptive content within thick concepts.

Allan Gibbard notes three ways in which the evaluative and descriptive aspects could combine within a thick concept – conjunction, licensing, or presupposition – and that all three fail, because there is insufficient descriptive content in a thick concept to meet the demands of these models.¹⁹² According to the conjunctive model, the concept user conjoins a descriptive statement and an evaluation, for example he states that the act is descriptively ‘*gopa*’ and positively evaluates it.¹⁹³ According to the licensing model, the concept user is licensed by the rules of language to use the term *gopa*, as long as he evaluates descriptive *gopahood* positively.¹⁹⁴ The presuppositions of a statement are the things that must be accepted for there to be agreement or disagreement. For all these models though there needs to be a clear understanding of what constitutes descriptive *gopahood*, and Gibbard argues that there is not.¹⁹⁵

Whether a clear understanding of descriptive *gopahood* can be established will be dependent upon how the evaluative and descriptive aspects within a thick concept

¹⁹¹ Andrew Fisher and Simon Kirchin, *Arguing about metaethics* (Routledge, 2006), 505

¹⁹² The combination of evaluation and description within a concept is an issue that concerned meta-ethicists prior to thick and thin concepts, and the three ways of characterizing the combination that Gibbard identifies (conjunction, licensing and presupposition) are not necessarily specific to thick concepts, although Gibbard is specifically addressing thick concepts in his article. See: Allan Gibbard, ‘Thick Concepts and Warrant for Feelings’ in Allan Gibbard and Simon Blackburn, ‘Morality and Thick Ethical Concepts’ (1992) 66 *Proceedings of the Aristotelian Society* 267

¹⁹³ Gibbard discusses thick concepts within the context of a scenario involving an anthropologist (an outsider) observing a Kumi tribe, he uses the example of *GOPA* (a thick concept): ‘In the case of *gopa*, say, the evaluative meaning is positive, and the descriptive meaning is something like what I already suggested: A *gopa* act, descriptively, is the killing of an outgroup member in the face of danger. Call such an act *descriptively gopa*, and call the property of being such an act *descriptive gopahood*.’ *ibid* at 273

¹⁹⁴ Williams endorses a similar view: see note 173 at 143-5 and rejects the prescriptivist two component analysis of thick concepts at 141. Simon Blackburn, *Spreading the Word* (Oxford University Press, 1984), 148-9 considers both a conjunctive and licensing model, suggesting that in practice it may be hard to determine between the two.

¹⁹⁵ The big problem for thick concepts like *GOPA* is that they are often surrounded by disagreement and uncertainty (in this instance we are imagining situations where the concept users are deploying their concepts carefully and yet still the standard criteria is unable to settle the matter). Even amongst the Kumi there may be disagreements about whether a particular act was an instance of *GOPA*, and further facts would not resolve the matter.

(such as GOPA) combine, because the nature of this combination will determine whether purely evaluative and purely descriptive content can be separated from the thick concept (and whether once separated this content would remain intelligible). This was previously the concern of non-cognitivists who were united by the thought that the evaluative attitude or stance could be detached or separated from the descriptive content in an evaluative concept (this position was often characterised as separationism).¹⁹⁶ The terms ‘separationism’ and ‘non-separationism’ are now employed by thick concept theorists in picking out the potential separability of the evaluative and descriptive aspects of thick (and thin) concepts.¹⁹⁷

Separability and Disentangling

If the evaluative and descriptive aspects of a thick concept are joined in such a way that they cannot be intelligibly separated from one another and identified as distinct isolated conceptual content then this tells us something very important about the way our concepts operate.¹⁹⁸ A non-separationist approach (non-separationists are normally cast as thinking that a concept must be either pro or con, but not both) argues that the descriptive and evaluative components of a thick concept are inseparable.¹⁹⁹ They are irreducible in the same way that concepts such as CARPET or CHAIR cannot be reduced into smaller parts.²⁰⁰ According to this view the evaluative and descriptive content forms an amalgam and even if the evaluative and descriptive content could be

¹⁹⁶ Hare’s prescriptivism (which has already been noted in this chapter) characterized the evaluative attitude in terms of some prescription or demand, and emotivism (another non-cognitivist position) characterized the evaluative attitude in terms of emotions that were evinced.

¹⁹⁷ On the one hand thick concepts seem to undermine a sharp division between the evaluative and the descriptive because thick concepts (and possibly thin concepts) are concepts where evaluation and description is combined (or amalgamated) in some manner (the nature of this combination will effect the sharpness of the distinction between the evaluative and descriptive content), but on the other hand talk of a combination (of any type) of these two aspects indicates a theoretical division in the first place.

¹⁹⁸ This phenomena is often referred to as shapelessness, because it is thought that any content that could be separated would be shapeless and therefore unintelligible. For a detailed discussion of the shapelessness hypothesis in relation to thick and thin concepts see: Simon Kirchin, ‘The Shapelessness Hypothesis’ (2010) 10 (4) *Philosophers Imprint* 1; Pekka Vayrynen, ‘Shapelessness in Context’ (2014) 48 *Nous* 573; and Simon Blackburn, ‘Disentangling Disentangling’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013)

¹⁹⁹ The following discussion regarding the nature of the relationship between the evaluative and descriptive aspects in a thick concept, is an extension of an earlier discussion regarding the separability of facts and values within evaluative concepts that was undertaken by those theorists engaged in the earlier meta-ethical debate between cognitivists and non-cognitivists. For example see the discussion between Blackburn and McDowell: John McDowell, ‘Non-Cognitivism and Rule-following’ in Andrew Fisher and Simon Kirchin (eds), *Arguing about Metaethics* (Routledge, 2006) and Simon Blackburn, ‘Reply: Rule-Following and Moral Realism’ in Andrew Fisher and Simon Kirchin (eds), *Arguing about Metaethics* (Routledge, 2006)

²⁰⁰ Some theorists suggest that this is because there is some quality that unites all the honest things and justifies our application of the term ‘honest’ to honest things, and this quality of honesty is irreducible.

separated, the detached descriptive content is shapeless because it could not be used to reliably pick out the same features of the world as the thick concept.²⁰¹ The supposition is that in an amalgam account the descriptive content is shaped by the evaluative so that it cannot stand on its own in an informative way.²⁰²

If on the other hand though, the evaluative and descriptive aspects can be identified and separated out from a thick concept then this tells us something different about our concepts and about the sharpness of the distinction between the evaluative and descriptive, which is crucial to the earlier claim that thick concepts ‘in some fashion combine both some evaluative, attitudinative aspect with a descriptive, non-evaluative aspect.’²⁰³ For the separationist a thick concept consists of some separable evaluative content and some separable descriptive content and a pro or con judgement can easily be added to this (in some way) to indicate additional context-specific information.²⁰⁴

²⁰¹ Jonathon Dancy’s work is one of the clearest accounts that asserts an amalgam view of thick concepts. Jonathon Dancy, ‘In Defense of Thick Concepts’ (1995) 20 (1) *Midwest Studies in Philosophy* 263. Andrew Payne challenges the amalgam view - he argues that ‘a proponent of the amalgam view is committed to denying that we can detach from a thick concept a descriptive, non-evaluative concept that picks out a feature of courageous actions that helps to explain why they are courageous.’ Andrew Payne, ‘A New Account of Thick Concepts’ (2005) 39 *The Journal of Value Inquiry* 98. Payne suggests an account of thick concepts that draws heavily from Geertz’s work on thick description, he argues that every thick concept will satisfy some thick description that shares the same beliefs, desires, and intentions necessary for satisfying the application of the thick concept in question. Therefore satisfying the thick description is also a necessary condition for the thick concept. Virtues and vices are the most obvious examples of concepts that satisfy this account of a thick concept, Payne argues that his account is favourable because it can also account for deontological thick concepts; such as those used to praise or blame actions or types of actions for being in line with or counter to a particular moral rule. Payne’s account departs from other amalgam views, because it allows for a distinction between the thick-descriptive component and the evaluative component within a thick concept. *ibid* at 89-103. Payne challenges this amalgam view and claims that by using a suitable thick concept we can do this, because the thick description of the agents desires, beliefs, and intentions, could be used to identify some of the evaluation of ends and means implicit in particular actions. The amalgam theorist (such as Dancy) may reply that there are many examples of actions satisfying the associated thick description that would not be examples of the thick concept, which clearly demonstrates that the description alone is insufficient.

²⁰² Dancy’s main argument for the amalgam view starts from an observation regarding the thick concept COURAGE, which he notes will have as its extension a wide range of actions with a bewildering array of descriptive properties. Attempting to detach from the thick concept COURAGE a purely descriptive concept that covers all of these instances of courage, will result in a concept that is naturally shapeless. The properties the detached descriptive concept COURAGE brings to mind will not constitute any consistent traits of courageous actions. See note 201 and Jonathon Dancy, ‘Practical Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013)

²⁰³ see note 191

²⁰⁴ Some separationists disagree with Hare and Blackburn and instead claim that the evaluation tied to the description is more specific than pro or con (whilst maintaining its ability to be analysed non-cognitively, otherwise it would count as a thick concept in its own right), or that a specific evaluation is tied more intimately to the description whilst still being insufficient to become a concept on its own, or some other option. It is also possible to be a separationist regarding thick concepts and a cognitivist (about one or all the elements thick concepts are supposedly composed of): the evaluative content is best not seen as an attitude, but rather represents a concept such as GOOD or PRO.

The debate between separationists and non-separationists considers the sharpness of the distinction between evaluation and description within thick (and possibly thin) concepts and whether this content could operate independently to pick out the same conceptual divisions and extensions that the thick and thin concepts could. The first concern regarding the evaluative conceptual content is that it is too coarse grained or thin to be able to conceptually pick out the *just* from the *kind*, and the second concern is that even if there were a whole range of evaluations that attached to the relevant descriptive contents such that the evaluation may be thicker than previously thought, these evaluations would be unable to divide clearly enough to be able to map and explain our conceptual divisions. Non-separationists argue that we cannot be certain that it is possible the detached evaluation could (logically) pick out the kind or just things without reference to the associated descriptive content. The evaluative content is therefore said to be shapeless with respect to identifying descriptive content (often referred to as the shapelessness hypothesis).

The *descriptive* content is viewed (by non-separationists) as equally incapable of independently mapping and explaining the conceptual divisions identified by thick and thin concepts. In other words, it is not possible to descriptively characterise evaluative concepts in a manner such that the descriptive concept consistently maps the same conceptual divisions (and only those divisions) that the evaluative concept identified.²⁰⁵ Non-separationists argue that it is extremely hard (and there is no way of knowing if it is even possible) to identify descriptive characterisations of our evaluative concepts that can capture all the instances of – say - ‘kind’ or ‘just’. The concern is that even if a descriptive list of features could be formulated for identifying instances of kindness and justness, these lists would always be open-ended and so it would be impossible to know when we had captured all the descriptive features of ‘kind’ and ‘just’. This becomes even more problematic when identifying new instances of kindness and justness unless we can guarantee that new cases will be sufficiently similar to old cases to enable their identification, and even then it would need to be possible to descriptively (*not* evaluatively) explain why these new cases are similar to the old cases. There may be no way out of the impasse between

²⁰⁵ Dictionary definitions of evaluative terms usefully illustrate the problem with attempting to find purely descriptive definitions of evaluative terms, as standard dictionary definitions use other evaluative terms and synonyms to explain the meaning of an evaluative term.

separationism and non-separationism, so that the debate regarding the fact-value distinction currently remains intractable.²⁰⁶

The apparently intractable debate between separationists and non-separationists regarding ethical concepts is not specific to thick and thin concepts. Simon Blackburn uses the issue of disentangling and shapelessness in his critique of thick concepts:

I believe, as everyone does, that many words are loaded, and loaded with many different things. I am more troubled with the idea that they introduce a unitary concept and hence that we cannot disentangle or usefully separate the different dimensions in the one term. The important point is that the idea behind thick concepts is that a candidate, such as 'chaste' or 'courageous', *simply does the one thing*.²⁰⁷

He suggests that there are other ways (such as loaded terms) that can be used to explain how within ethics our descriptions also perform an evaluative role. Evaluative attitudes can be expressed by intonation and emphasis, not just lexical utterances. Characterising these ethical descriptions (that also seem to perform an evaluative role) in terms of a loaded description implies that the evaluation (the loading) can be removed and put upon something else. 'The issue is whether we should see the unitary, thick concept as fundamental, or the idea of a loaded way of describing things, where the load plays a role in determining which things are so described, but where the load can in principle also be shed.'²⁰⁸ Blackburn's argument for the use of loaded terms over thick concepts demonstrates that whilst many separationists and non-separationists now discuss ethical concepts using the language of thick and thin, not all meta-ethicists have been convinced by this transition. Effectively these theorists (even

²⁰⁶ So far the above discussion has favoured non-separationism and as Simon Kirchin notes much of the literature on shapelessness and disentangling seems to adopt the view or prejudice that separationism is a non-starter. He suggests that even if we could never know whether we had successfully captured an evaluative concept descriptively (irrespective of whether we had), and even if there was always the worry that the future would present new instances that could not be identified by the descriptive alone, this only suggests that it might be best to adopt non-separationism initially as a safety net. see note 171 at 8-10

²⁰⁷ Simon Blackburn, 'Through Thick and Thin' in Allan Gibbard and Simon Blackburn, 'Morality and Thick Ethical Concepts' (1992) 66 *Proceedings of the Aristotelian Society*, 122. Blackburn along with other expressivists such as Hare and Stevenson are often accused of committing the 'fallacy' of failing to recognize that a word can do two things at once: both describe and evaluate. He replies that ironically it's actually the 'thick lovers' who are guilty of denying that there are two things we are doing, whereas expressivists recognize that there are two activities and we are engaged in both at once. He in fact goes further than this by saying that there are many more than two things we are engaged in, since positive/negative evaluations are only one kind of stance that we often wish to communicate.

²⁰⁸ *ibid* at 123

those who are yet to accept the merits of the thick-thin concept distinction) question whether thick concepts are whole concepts or whether they are merely shorthand for more basic terms or concepts that are grouped together under the convenient shorthand ‘thick concept’.²⁰⁹

At present the reader may be under the impression (quite understandably) that only two kinds of concepts (thick and thin) are distinguished in the meta-ethical literature, but not all theorists would agree with this.²¹⁰ Hence my second question.

Q 2 Is the distinction between thick and thin concepts based on a distinction between two different kinds of concept?

The first thing that arises when discussing any distinction (such as the distinction at hand between thick and thin concepts) is the nature of the supposed distinction in question – is it a clear distinction? Identifying two different concepts (thick and thin) as two separate, distinct conceptual entities (thick ones and thin ones) suggests that there is at least a fairly clear distinction at work here (not all theorists agree with this).

Definitions that differentiate thick concepts from thin concepts on the basis that thick concepts contain both descriptive and evaluative content, whereas thin concepts contain only evaluative content, need to be treated with extreme caution, because often there is a more subtle distinction that is brushed over. There is a subtle yet significant distinction between the claim that thin concepts are wholly evaluative and lack any descriptive content and the claim that thin concepts are predominantly, primarily, or mainly evaluative and therefore contain less descriptive content than their thick counterparts. The first claim is indicative of a difference of kind between thick and thin concepts: thick concepts are concepts that specifically contain these two kinds of conceptual content and therefore based upon recognition of this conceptual content within a concept such as HONEST, it should be possible to identify HONEST as thick or thin. If the distinction between thick and thin concepts picks out two different kinds of

²⁰⁹ Blackburn challenges the importance theorists have placed on thick and thin concepts, he finds it odd that Williams needed to find a term of art to describe a phenomena of language, when good words already existed that captured this (e.g. loaded words or loaded descriptions).

²¹⁰ There are obviously many ways of classifying concepts and even within meta-ethics ‘thick’ and ‘thin’ are not the only terms used to classify concepts, the question that is of interest to thick-thin theorists (and my thesis) is whether within the framework of thick and thin there exists only two categories, or whether there exists multiple categories of varying thicknesses and multiple categories of varying thinnesses.

concepts then ethical concepts must be either thick or thin. The second claim entails a difference of degree, asserting that thick and thin concepts contain evaluative and descriptive content of varying degrees, and so it is possible to compare and contrast ethical concepts such as HONEST and COURAGE against other ethical concepts such as JUST and KIND based on their differing levels of descriptive and evaluative content.

A difference of degree is often thought of as one continuous scale ranging from the thickest to the thinnest concepts, and all of our thick and thin concepts could be plotted at some point along this scale.²¹¹ The position of a concept along the scale may alter, for example COURAGE may be thought to be a fairly thick concept but its exact position along the scale of thickness may alter as it is contrasted with other thicker or thinner concepts. A concept does not need to be either thick or thin to occupy a position along the thick-thin scale for it could be thickish in some contexts and thinnish in others. The scale could be open ended as there may be new concepts discovered (or created) that are thicker or thinner than those that were previously thought to sit at each end of the thick-thin scale.²¹²

Even though a difference of kind doesn't necessarily indicate a sharp distinction between thick and thin concepts, it does presuppose a clearer distinction between thick and thin concepts than a difference of degree would allow. A difference of kind may seem more favourable, because it seems neater and somehow easier to understand the difference between thick and thin if they are two distinct kinds of concept, as a concept can only be of one kind or the other. In practice though thick and thin concepts do not neatly fall into one of two categories and there may be many reasons for this - some of

²¹¹ Many commentators such as Scheffler and Tappolet like the idea of a difference of degree, because they argue that when we look at some typical examples of thick and thin concepts from our ethical vocabulary some thick concepts seem thicker than other thick concepts, and some thin concepts seem thinner than others. Samuel Scheffler, 'Morality Through Thick and Thin: A Critical notice of *Ethics and the Limits of Philosophy*' (1987) 96 (3) *Philosophical Review* 411 and Christine Tappolet, 'Through Thick and Thin: *Good* and its Determinates' (2004) 58 (2) *Dialectica* 207

²¹² Simon Kirchin in his 'Thick Concepts' manuscript has suggested that the scale of thickness and thinness might not be best perceived as one long continuum, as it might be possible to identify different categories or subdivisions along the continuum. The difference between these categories or subdivisions might be minute (appear to be a matter of degree) and there could be an increasing number of categories or subdivisions along the continuum, but all of these different sub-divisions would be distinct. This approach would result in multiple differences of kind, even if they were differentiated along a scale of thick and thin.

these reasons may be specific to the thick-thin distinction, others may apply to any way of distinguishing between concepts.²¹³

A difference of degree might seem messier and more open to disagreement, but it may be a more accurate reflection of our conceptual practices and the nature of our concepts. For example GOOD and PRO seem very thin, whereas KIND and THOUGHTFUL seem thicker than GOOD and PRO, but thinner than COMPASSIONATE, EMPATHETIC and SYMPATHETIC. Consider a situation where you are trying to distinguish between ‘good’ and ‘right’ in determining what you ought to do in a particular situation. Both seem fairly thin concepts, but good is thinner than right, because a good action is only one of a possible range of positive actions, whilst a right action (or answer, or idea) is the only option judged positively amongst a range of possible options. There can be only one right thing, but there can be many good things.

Arguing that ‘right’ is thicker than ‘good’ does not mean that there cannot be even thicker concepts that can be useful in this scenario given more information regarding the context of the decision to be made. What it does indicate is that a difference of degree rather than kind is the best possible way to explain the distinction between thick and thin concepts. There are quite clearly connotations and associations suggested by both concepts, even if the thicker of the two concepts – ‘right’ – exhibits stronger connotations and associations.²¹⁴

Timothy Chappell has two *a priori* doubts regarding thin concepts:

As we may put them, we can doubt whether there are thin *concepts*; we can doubt, too, whether there are *thin* concepts. Maybe nothing could fit the specification of thinness as pure evaluation and still genuinely be a concept: that is the first doubt. Or maybe the usual examples of thin concepts, though they are concepts, are thick concepts not thin ones: that is the second doubt. I have both doubts.²¹⁵

²¹³ The problems that surface in relation to classifying concepts as thick or thin may actually be indicative of wider philosophical problems in relation to concepts and conceptual analysis, and may provide evidence that our concepts (of any type) are resistant to classification.

²¹⁴ Consider the examples - GOOD and PRO – both can be used descriptively, but does this mean that they contain descriptive content? If they do, then this would be another argument in favour of a difference of degree as opposed to a difference of kind.

²¹⁵ Timothy Chappell, ‘There Are No Thin Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 184

Chappell worries that once we've separated off the descriptive part (if possible) then there will be nothing conceptual left for the evaluative to be a part of. Therefore when we are dealing with thin 'concepts' where there is supposed to be only evaluative content, we won't find anything genuinely conceptual at all.²¹⁶ He argues 'it is only our lack of analytical distance on our own key moral concepts that makes them seem anything other than thick to us.'²¹⁷ He cites Elizabeth Anscombe as one author who manages to get some analytical distance, as she concludes that MORALLY GOOD, RIGHT and OUGHT are just extremely particular and indeed peculiar historical products and denies that OUGHT expresses any concept at all: it is a word of 'mere mesmeric force'.²¹⁸

Despite this Chappell does allow for two possible thin concepts. He states from the beginning that there are almost no pure thin concepts, and if there are any, then GENERIC-DEMANDEDNESS and GENERIC-COMMENDEDNESS are the only two possibilities. He only admits the theoretical possibility of these concepts, because they are unstable and less useful to ethicists than might at first be supposed. They are not naturally occurring concepts, they have to be stipulated into existence, and even then when using such purely evaluative concepts it won't necessarily be our own evaluation we're expressing, as we can still use them whilst distancing ourselves. The gap between the naturally occurring moral concept and the theoretically stipulated moral concept is a large one, which for Chappell we cross at our own peril (too often we don't even notice when we have). For GENERIC-DEMANDEDNESS and GENERIC-COMMENDEDNESS to be purely thin concepts they have to be so abstract that they are unintelligible within the contexts and practices of any actual society.

Many theorists - such as Simon Kirchin - suggest that even the thinnest thin terms such as PRO and CON could tell us something about the way the world is, as these contain at

²¹⁶ Chappell allows for a continuum of thickness, and this has been used by his critics to argue that there are thin concepts under his account, they are just the ones closest to the thin end of the spectrum. His denial of the existence of thin concepts is therefore criticized for being merely a terminological point. He replies: 'Terminological perhaps, but not *merely* terminological. Sometimes a thorough cleanout of our terminology is the best, may be even the only way to stamp out a persistent mistake. So here, I think, "the relatively general and unspecific moral concepts" is a better name for GOOD, OUGHT, and RIGHT, than "the relatively thin moral concepts", because it does not allow us so easily to slip back into the mistaken idea that any concepts are absolutely thin, or thin *simpliciter*.' *ibid* at 191

²¹⁷ *ibid* at 188

²¹⁸ Elizabeth Anscombe, 'Modern Moral Philosophy' (1958) 33 (124) *Philosophy* 1. Chappell disagrees with her on this specific point (he thinks it expresses a concept we're better off without), yet he can conditionalise her denial to say that if it expresses a concept, then it expresses a thick one.

least some descriptive content (even if this is sparse and tells us much less than GOOD or HONEST would).²¹⁹ We use thin terms to represent and correspond to features of our world, however the extent to which these terms actually have purchase on reality is questionable, although use is a good indicator to start with.

An alternative consideration of the distinction between thick and thin concepts contends that whilst a two-part distinction fails to sufficiently capture the variety of thicknesses and thinnesses that is possible, this is still not indicative of a difference of degree. A difference of kind could still be the best explanation of the distinction between thick and thin concepts, as long as there are more than the two kinds – more than just thick and thin. If thin concepts can only provide description of a positive or negative stance and comparative information about the thing in relation to others, whereas thick concepts can provide specific descriptive information about the thing being categorised, then this could be used as evidence of a difference of kind rather than degree, albeit a difference of kind that is made up of multiple kinds, not just two. When we consider thin concepts that are more overtly action-guiding such as OUGHT, then this distinction of kind may prove problematic. Some accounts of OUGHT claim that not only is there a positive classification of the action conveyed when the term is used, but its use also indicates that we can perform that action, a kind of description of permissibility. This could be classed as descriptive content, something only the thick concepts are meant to contain and if this is the case then it may point to a difference of degree, unless one were to classify OUGHT as a thick concept, but I think most theorists would agree that it is much thinner than most of our standard thick concepts. There may be a way around this, if the additional information conveyed by the term ‘ought’ identifying it as a ‘do-able’ action was perceived as relational content rather than a feature of the action itself, this would bring it more in line with our earlier examples of GOOD and RIGHT.

Either way it is clear that we need to be careful when deploying a bald distinction between thick and thin concepts because there will always be an underlying commitment to a difference of degree or of kind and neither seems to be able to neatly capture all that is going on here. This study does not favour one over the other and

²¹⁹ Simon Kirchin identifies generic-PRO and generic-CON as two basic thin concepts, but Chappell is suspicious, because he thinks generic-PRO either confuses demand and commendation, or tries to smuggle APPROVAL into the discussion (which is decidedly thick). As CON is meant as the negation of PRO, it shares the same fault.

instead suggests that this point of contention amongst thick-thin theorists can actually prove useful for law because it emphasises the problematic nature of this aspect of our conceptual distinctions and conceptual practices.

So far this study may have given the reader two impressions that need to be clarified. First: that the status of a concept as thick or thin is settled (however, not all theorists would agree with this picture of thick and thin concepts²²⁰); and second, that the *evaluations* associated with a thick (or thin) concept are settled - for example the concept will always be used to evaluate positively not negatively, or vice versa (again not all theorists would agree with this picture of evaluation²²¹). Clarifying these two impressions draws on an aspect of the thick-thin literature referred to as 'evaluative flexibility'.

Evaluative flexibility:

Some supposed thick concepts have a flexible relationship with attitude and sometimes at any one time there may be a variety of attitudes and stances that could attach to the concept in question.²²² Individual terms such as 'duty' can seem quite thin in most contexts, but if you consider the term 'duty' as spoken by an Italian Mafioso when talking about his family, or a philosophy seminar leader discussing Kant's ethics, then

²²⁰ An account of thick and thin concepts that can change their thickness and thinness seems to fit well with an ordinary language approach that emphasises the importance of context in concept use (such as Ryle's) and I highlighted in the previous chapter the influence of the ordinary language approach to philosophy on the development of thick concepts.

²²¹ Blackburn paints a picture of language where there is a multiplicity of attitudes and feelings that can be associated with terms, a repertoire of linguistic expression that is constantly changing and flexible, where feeling is often signalled by intonation rather than vocabulary. It is often unreliable to read back attitude from vocabulary for these very reasons. Blackburn argues 'that attitude is much more typically, and flexibly carried by other aspects of utterance than lexical ones.' See note 207 at 285. Blackburn develops Kant's line of thought that there is nothing conditionally good about concepts such as COURAGE and TEMPERANCE (they can be put to bad or good uses), of course we have expectations regarding their standard use but this is not set in stone by a prior theory or conventions that govern their use and go directly to their meaning. Blackburn admits that while there are some terms where a positive or negative qualification is more often than not a part of their dictionary meaning, even in these instances we need to be careful regarding convention or meaning when we talk of evaluation. Communication of attitude in language is complex and can often be carried by intonation. Saying something with attitude in your voice often licenses and leads the hearer to assume that the attitude is expressed because of what is said, rather than because of the way it was said.

²²² Blackburn argues that this is something that can equally be captured by loading. Words can shed one load and bear another, words are often ready to be decoupled from the particular stances they are normally associated with. It is only possible to decouple something that can be coupled though (or unload something that was loaded). He thinks that for thick concept theorists this is not possible, all they can do is 'junk one term, and replace it by an (accidentally? unfortunately?) homologous one.' Simon Blackburn, 'Disentangling Disentangling' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 131

in both instances it is easy to see how the term ‘duty’ could be said to be much thicker than usual, because of the rich connotations (these could be descriptive or evaluative) it carries in context. Consider the terms ‘fair’, ‘unjust’ and ‘wrong’: it was unfair that Sam got the last ice cream, or it was unjust of them to not pick me or it was wrong to turn off the alarm clock and have a lie in. All these terms can also be used in a legal context and just as with the above example of duty, these terms are much thicker than usual when used in a legal context because they carry legal connotations.

‘Evaluative flexibility’, occurs when a thick concept is used in a pro way in one context and in a con way in another. For example HONEST is normally used in a pro way, but there may be instances where we use HONEST in a con way, as a criticism rather than a compliment. Maybe it was wrong to be ‘honest’ in that situation and it would have been better to be discrete instead.²²³ The fluidity offered by an account that allows for evaluative flexibility may be favourable based on the argument that these accounts of thick and thin concepts are a better reflection of our language practices.²²⁴

It is normally assumed that evaluative flexibility is not an option (I phrase this tenuously because not all non-separationists would agree that evaluative flexibility is incompatible with non-separationism). Evaluative flexibility may be captured by a non-separationist account of thick concepts that contains multiple conceptual versions of honesty, such as HONEST PRO, HONEST CON and HONEST NEUTRAL, which are all separate concepts. They have a lot in common, but only one is applicable in any given situation. Non-separationists are not committed to there being just one specific thin evaluation that is tied to any thick concept. It is perfectly consistent for a non-separationist to claim that sometimes honesty can be bad and at other times it can be good, because all they were committed to was the claim that evaluation (not

²²³ Linguistic devices such as sarcasm can often subvert typical linguistic conventions relating to that concept and this can not only lead to a change in a concepts thickness or thinness, but additionally a change in the attitude typically conveyed by this concept (for example from a positive to negative stance). An example of this would be if you were to characterise someone as good but intend it to be a negative reflection of their character, maybe for example you think they are a ‘goody-goody two-shoes’. The relationship between linguistic devices such as sarcasm and the evaluative aspect of thick and thin concepts is a contentious issue amongst meta-ethicists though and should be treated with caution.

²²⁴ Separationists such as Hare and Blackburn, argue that the benefit of their account is that it can accommodate evaluative flexibility quite easily, whereas the non-separationist struggles. Blackburn argues that if there were thick or more basic concepts in ethics, surely these would be easier to find, if we consider the evaluative terms discussed by Hume and Aristotle (now touted as thick concepts) all we find is detachable and flexible attitudes that are coupled with descriptions of character traits or actions. see note 222

necessarily one specific form of evaluation) was irreducibly linked to description in thick concepts. Non-separationist mastery of a thick concept would involve knowing which situations require a pro application and which a con application of HONESTY (or maybe something other than pro/con). According to this account the thick concept can be applied with different evaluations, flexibly, as the context requires, it is just that only one evaluation will be suitable for that situation. It is hard to imagine a kind of evaluation that is neither pro or con, that is neutral or something else entirely, but maybe this is because it is so deeply engrained within us that evaluation has to be either pro or con. Even if it is hard to imagine that evaluation could have an evaluative valence that isn't either PRO or CON, this does not necessarily mean that our preconceived understanding of evaluation is correct (or incorrect), it may simply mean that discussion of evaluative flexibility in thick and thin concepts can help to shed light on evaluative valence and enrich our understanding of evaluative conceptual content. Discussion of thick and thin concepts can be extremely beneficial even if there is no resolution yet amongst theorists, because it encourages critical reflection upon so many aspects of our conceptual practices (including evaluative conceptual content and descriptive conceptual content) and although agreement may not have been reached yet the insights that can be gained from such critical reflection are particularly useful.

4 – Conclusion.

Despite the lack of consensus regarding the nature of thick and thin concepts the distinction is still advanced by many philosophers in multiple disciplines (its use is actually increasing as more disciplines begin to deploy it to achieve a variety of different tasks). There is considerable scope for discussion (from the literature covered in this chapter it is clear that there are a variety of formulations of thick and thin concepts), which is why my thesis does not defend a particular version of thick and thin concepts. To be able to apply the distinction between thick and thin concepts within law, I will need to adopt at least some kind of specific understanding of thick and thin concepts in my thesis (even if this formulation only serves as an exemplar for the possibilities of employing thick and thin in law and is not advanced as 'the' formulation of thick and thin concepts). I have chosen Bernard Williams' formulation for reasons that will become clear, and therefore at this point - although there is more that could be said about the current meta-ethical treatment of thick and thin concepts -

it will be better to move onto an exegesis of Williams' formulation and flesh out the notion of a thick concept and thin concept in more detail through his work, subject of the next chapter.

Chapter Four: Bernard Williams'
Ethics and the Limits of Philosophy

1 – Introduction.

There are three reasons why Bernard Williams' *Ethics and the Limits of Philosophy*²²⁵ provides a good starting point for consideration of thick and thin concepts in law.²²⁶ First – it is the first coinage in print of the term 'thick' concept; second – it is the formulation that the majority of the legal theorists writing on thick and thin concepts work with; and third – it is one of the most well known formulations. Williams was writing in meta-ethics so his classification of concepts as either thick or thin utilises ethical concepts as examples (although as the previous chapter indicated thick and thin concepts are not specifically ethical).²²⁷ Williams' formulation is accompanied by ethical claims/arguments that are of relevance to law, and because they provide some interesting insights into social practices such as ethics and law this chapter addresses both his formulation and the ethical claims/arguments that accompany it.

2 –Williams' development of thick concepts.

Bernard Williams coined the term thick ethical concept in his *Ethics and the Limits of Philosophy* (I will refer to this as ELP from now on) and provided the first formulation of a thick ethical concept; he also used the term 'most abstract concept' (as had Gilbert Ryle²²⁸ before him in relation to thin descriptions), to refer to what was later

²²⁵ Bernard Williams, *Ethics and the limits of Philosophy* (Routledge Classics, 2011)

²²⁶ Williams was one of the most important contemporary analytic philosophers who published mainly in the field of ethics. The following is a list (not an exhaustive one) of some of his published books, see: Bernard Williams, *Morality: An Introduction to Ethics* (Cambridge University Press, 1972); Bernard Williams, *Problems of the Self* (Cambridge University Press, 1973); Bernard Williams and J. J. C. Smart, *Utilitarianism: For and Against* (Cambridge University Press, 1973); Bernard Williams, *Descartes: The Project of Pure Inquiry* (Pelican, 1978); Bernard Williams, *Moral Luck* (Cambridge University Press, 1981); Bernard Williams, *Shame and Necessity* (University of California Press, 1993); Bernard Williams, *Making Sense of Humanity* (Cambridge University Press, 1995); Bernard Williams, *Plato* (Phoenix, 1998); Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton University Press, 2002); Bernard Williams, *The Sense of the Past: Essays on the History of Philosophy* (Cambridge University Press, 2005); and Bernard Williams, *Philosophy as a Humanistic Discipline* (Princeton University Press, 2005)

See the following secondary literature, for a useful text on how to read Williams' philosophy: Daniel Callcut (ed), *Reading Bernard Williams* (Routledge, 2009); for an interesting biography on Williams see: Alan Thomas, *Bernard Williams* (Cambridge University Press, 2007)

²²⁷ I use the word either throughout this chapter even though it is indicative of a difference of kind rather than degree, because as will become apparent in this chapter it is not always clear whether the distinction between thick and thin concepts Williams advanced was based on a difference of kind or a difference of degree. In the next three chapters the focus shifts from ethical concepts to legal concepts, although it is Williams' formulation of thick (ethical) and thin (ethical) concepts that is applied to law, so ethical concerns will resurface.

²²⁸ Gilbert Ryle, 'The Thinking of Thoughts: What is 'Le Penseur' Doing?' in *Collected Essays 1929-1968* (Routledge, 2009)

characterised as a ‘thin’ concept. It was Samuel Scheffler in his 1987 review²²⁹ of ELP who first used the term ‘thin concepts’ to discuss Williams’ ideas.²³⁰

Gilbert Ryle used the phrase ‘thick description’ in his *The Thinking of Thoughts: what is ‘Le Penseur’ doing?*²³¹ to refer to more specific descriptions, those which are used to categorize an action or thing. Ryle poses a number of scenarios involving winking and thinking. First he considers the action of winking and poses various scenarios involving similar actions. Second he considers the activity of thinking and poses various scenarios involving similar activities to try to identify what it is for someone to be thinking. Throughout his discussion of these scenarios he asks what is common to them and he concludes that it is the thinnest description. So it is through the use of the terminology thick and thin description that Ryle thinks he can identify and explain how two actions can appear to be the same whilst ultimately being different. Ryle chooses actions that can appear to all be the same (yet are quite clearly different and distinct) and argues that it is the thicker descriptions for these actions we rely on every day to distinguish between them.

Both Ryle and Williams advance a non-separationist account and argue that the thin is abstracted from the thick.²³² Although Ryle never specifically discusses the idea of thick concepts, his ideas on concepts in general and his work on thick descriptions hint at the idea of thick concepts, or at the very least that his account of concepts could accommodate thick concepts. They both advance the notion that some concepts are much more specific than others, and it is from Ryle that Williams gains the term ‘the most abstract’ concepts to refer to what is now generally known as a ‘thin concept’. Ryle’s idea of thick descriptions (and of thick concepts in general) is much broader than Williams’ because although they are evaluations in the wide sense that they are ‘judgements’, unlike Williams he does not overtly consider action-guidance, praise or blame. Ryle’s ideas are not evaluative in the way Williams and others now envisage

²²⁹ Samuel Scheffler, ‘Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy’ (1987) 96 (3) *The Philosophical Review* 411

²³⁰ The majority of the philosophical and legal literature post Williams, uses the term ‘thin concept’ even when referring to Williams distinction; I also adopt this approach.

²³¹ See note 228. Thick descriptions are also mentioned in another paper within the same collection of his work, see: Gilbert Ryle, ‘Thinking and Reflecting’ in *Collected Essays 1929-1968* (Routledge, 2009)

²³² In the previous chapter I explained the non-separationist claim that the two types of conceptual content (normally categorized as evaluative and descriptive) cannot be intelligibly separated.

thick concepts to be.²³³ Despite many differences Williams' early training in the philosophical methods of Ryle and Austin is clearly visible in his writing²³⁴ and the influence of Rylean and Austinian methods is indicated by Williams' emphasis on the importance of context.²³⁵

Williams' formulation of thick ethical concepts is advanced alongside a criticism of linguistic analysis, and he makes it quite clear that he is by no means a linguistic philosopher, or in favour of what he terms the 'linguistic turn' that had come to dominate philosophy.²³⁶ Williams notes:

What has happened is that the theorists have brought the fact-value distinction to language rather than finding it revealed there. What they have found are a lot of those "thicker" or more specific ethical notions I have already referred to, such as *treachery* and *promise* and *brutality* and *courage*, which seem to express a union of fact and value.²³⁷

In this section of ELP Williams defines thick concepts as expressing a union of fact and value, but very quickly moves away from this phrasing to defining thick concepts in terms of action-guidance and world-guidedness.²³⁸ Thin ethical concepts are introduced in chapter eight entitled 'Knowledge, Science, Convergence.'²³⁹ By this point his distinction is solely based on action-guiding and world-guided content.²⁴⁰

²³³ Williams had a very particular notion of thick ethical concepts in mind that involved the specific type of evaluation he refers to as action-guidance. I discuss this in section three of this chapter. For criticisms of this see: See Simon Kirchin, Samuel Scheffler, Simon Blackburn, and Allan Gibbard. Simon Kirchin, 'Thick Concepts and Thick Descriptions' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013); Samuel Scheffler, 'Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy' (1987) 96 (3) *The Philosophical Review* 411; and Allan Gibbard and Simon Blackburn, 'Morality and Thick Ethical Concepts' (1992) 66 *Proceedings of the Aristotelian Society* 267

²³⁴ Alan Thomas, *Bernard Williams* (Cambridge University Press, 2007), 1

²³⁵ Simon Kirchin notes Miranda Fricker mentioning to him that Williams once referred to Ryle as both his mentor and teacher. See: Simon Kirchin, 'Thick Concepts and Thick Descriptions' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013)

²³⁶ It is interesting to note that chapter seven where he first introduces the terms thick and thin concept is entitled – 'The Linguistic Turn' – chapter two of my thesis noted the turn towards language within Analytic Philosophy. His choice of title reflects the context of the period of philosophy Williams was writing in: his formulation of thick and thin concepts challenges the Prescriptivist account of ethical concepts; and is influenced by the later Wittgenstein on language (meaning as use) and Gilbert Ryle who were both ordinary language philosophers. The importance of ordinary language philosophy was also noted in chapter two.

²³⁷ See note 225 at 143-144. The similarities between Williams' formulation of a thick concept and Hurley's distinction between 'specific' and more 'general' concepts can be seen in this section of ELP. Susan Hurley, *Natural Reasons Personality and Polity* (Oxford University Press, 1992)

²³⁸ At this point I do not elaborate on what he means by a union between fact and value or action-guiding and world-guided content, for example whether this union is permanent (advances non-separationism) or temporary (advances separationism), but this will be discussed later in this chapter.

²³⁹ Again the choice of chapter title is important because it references the decline of the Classical Theory of Concepts (see chapter two) and the popularization of logical positivism as reflected in law by the rise

Lying at the heart of these treatments, the fact-value distinction is often described loosely as a distinction between “what is” (fact) and “what ought to be” (value).²⁴¹ Talk of facts and values often brings into play many other distinctions, such as those between science (facts) and ethics (values); positive and normative; and the evaluative and the descriptive. These distinctions are not synonymous (although they are sometimes used co-extensively, or otherwise in a manner that would seem to imply that they are synonymous), but they are all related. The fact-value distinction is a source of conflict between science and ethics, because scientific statements are statements about the way the physical world is that can be proved through empirical methods to be either a true or false account of the world (that is, they are truth-apt). It is through scientific methods that we claim to be able to empirically and logically verify these truth claims and attribute to them, when we grasp them, the status of knowledge, hence they are often referred to as facts. Value statements are frequently deemed to operate differently. Subjectivists, for example, sometimes think that “what ought to be” is a matter of consensus or a judgement that is merely ‘believed’ to be objectively morally binding. Values are often referred to as moral beliefs (factual claims are rarely referred to as beliefs), because values cannot be derived from the senses and then tested using scientific methods, and as is well known, this led some academics to argue that values are not truth-apt; they can be derived only from an individual’s subjective reasoning about value, and they can be tested only by comparison with the individual’s framework of value and worldview. It is for this reason that facts are characterised as actual states of affairs and values are often thought to be best understood as non-factual claims about what is good, such as giving to charity.²⁴²

of legal positivism. It is also important to Williams’ argument that the fact-value distinction would be better understood as a distinction between science and ethics.

²⁴⁰ It is this latter definition that is widely associated with Williams and quoted throughout the literature on thick and thin, so I operate with this one throughout my study.

²⁴¹ David Hume’s claim that you cannot derive an ought from an is and G. E. Moore’s naturalistic fallacy are both based on a distinction between fact and value, although they understand it differently. Moore’s treatment is more recent, but very controversial. Hilary Putnam rejected the fact-value distinction and argued that the distinction between fact and value was not as clear-cut as Hume envisioned. The literature on this is vast (Hume, Moore and Putnam are just a few of the notable contributors) but I am solely concerned with the literature on the fact value distinction that pertains to thick and thin concepts.

²⁴² The distinction between facts and values is widely contested, so there are multiple accounts available, but this basic distinction is sufficient to ground my discussion of Williams’ work.

Philippa Foot argues it would not be an exaggeration to state that moral philosophy rests on a contrast between statements of fact and evaluations, often referred to as the fact-value distinction. Statements of fact can be shown to be true or false on the basis of evidence, and there are certain constraints upon what counts as evidence. No two people can count different things as evidence for the same statement without one being guilty of linguistic ignorance or at least conceptual ambiguity or mistake. Good evidence for a factual conclusion cannot be ignored and not counted as evidence in order to evade a conclusion that otherwise appears to follow. With evaluations though there are no such limitations; that is, there is no logical connection between evaluations and the factual statements on which they are based. Two people may disagree whether a thing is good because only one accepts the fact as evidence of the thing's goodness. There is nothing within GOOD that dictates which things count as evidence and which do not, but there are nonetheless some constraints on the term 'good' that prevent it from becoming morally meaningless. Even if people disagree over which things to have pro-attitudes and therefore designate as good, they all still agree that good is used in connection only with a 'pro-attitude'.²⁴³ Foot identifies two assumptions about evaluations:

Assumption (1) is that some individual may, without logical error, base his beliefs about matters of value entirely on premises which no one else would recognise as giving any evidence at all. Assumption (2) is that, given the kind of statement which other people regard as evidence for an evaluative conclusion, he may refuse to draw the conclusion because *this* does not count as evidence for him.²⁴⁴

Foot argues that assumption one is dubious and that we shouldn't be allowed to speak of 'evaluation', 'commendation' or 'pro-attitude' as if we can understand them, irrelevant of the action concerned. Foot argues that assumption two could be true even if one were false, as it might be that even if on a particular question of values a disputant could accept the factual premises, they could still fail to draw the same moral conclusions or discuss any moral questions that might introduce moral terms. She states: 'the point is that any statement of value always seems to go beyond any statement of fact, so that he might have a reason for accepting the factual premises but refusing to accept the evaluative conclusion.'²⁴⁵ The linguistic analyst's heavy focus on words such as 'ought', 'good' and 'right', has given these words when used in their

²⁴³ Foot does not have in mind uses that subvert typical linguistic conventions.

²⁴⁴ Philippa Foot, 'Moral beliefs' (1958) 59 *Proceedings of the Aristotelian Society* 83, 84

²⁴⁵ *ibid* at 95

moral context a false air of authority that is dependent on a moral and religious world view that no longer dominates.

In ELP Williams notes the seminars led by Philippa Foot and Iris Murdoch in the late 1950's and references the work they were producing at the time as a source of inspiration for his work on thick concepts.²⁴⁶ Williams uses his formulation of thick concepts to challenge the distinction between fact and value and to demonstrate that the distinction is not as clear-cut as many non-cognitivists think because it may not be easy to de-couple the attitudes from the things one has those attitudes towards and still offer any sort of action-guidance.²⁴⁷ It is therefore important to note that Williams' work on thick ethical concepts follows closely in the footsteps of Foot and Murdoch's challenges to the fact-value divide popularised by Logical Positivism, which for many years prior to that had been widely accepted.²⁴⁸

Williams' contribution to philosophy.

Williams' contribution to philosophy extended much wider than ethics.²⁴⁹ One of the criticisms that is consistently levied against him, is that 'he was a brilliant critic of other philosophers but had no systematic outlook of his own.' Alan Thomas argues 'a systematic outlook, no; a consistent set of theses all arranged around what Williams called "the need to be sceptical", yes.'²⁵⁰ Williams' scepticism towards ethical theories and morality is something that is very apparent in his work on thick and thin, in which he criticises ethical theories for distorting the subject matter and presenting an impoverished reality, resulting in "empty" and "boring" moral philosophy. Expecting Williams' formulation of thick ethical concepts to generate a theory of the thick would

²⁴⁶ see note 225 at 217-218

²⁴⁷ I have only cited thick concepts here because it was thick concepts that combined both kinds of content and it was this combination that he thought challenged the fact-value distinction. Williams agrees with Foot's earlier concerns regarding the fact-value divide and de-coupling attitudes from the thing one has those attitudes to, that were voiced in her: Philippa Foot, *Virtues and Vices* (Oxford University Press, 2002)

²⁴⁸ There were many others writing on thick concepts (even if they were not using the term 'thick concept') during the 1980's and 1990's, which I have not mentioned above - such as Simon Blackburn, Johnathon Dancy, Allan Gibbard, Susan Hurley, John McDowell and David Wiggins - their work has influenced my understanding of Williams' formulation of thick and thin more generally. I noted their contributions in chapters two and three when noting the influence of cognitivism and non-cognitivism. The idea of thick and thin concepts was still in its infancy at this time, many of these theorists were writing directly on the fact-value distinction and as a result contributed to the development of the literature on thick and thin concepts.

²⁴⁹ His two main interests were moral philosophy and personal identity, towards the end of his career he was also interested in the concept TRUTH, see note 227 earlier in this chapter for a list of his publications.

²⁵⁰ see note 234 at 2

therefore be inconsistent with Williams' philosophical outlook and aim. Williams' contributions have not normally taken the form of theory construction precisely because he 'often perceived particular ethical theories as failing to orient themselves convincingly in relation to conspicuous features of ethical phenomena as actually experienced.'²⁵¹ He was unconvinced 'that there is any legitimate philosophical question that is best answered by assembling the kind of normative intellectual structure that philosophers refer to as an ethical theory.'²⁵² A reading of Williams that is open to his sceptical approach can see that rather than being destructive, his work challenges ethics to be something more than it had been and raises significant questions that at the very least need careful consideration. His sceptical approach can be useful in challenging many of the shared, core concerns of philosophy and law, such as those that underpin the legal positivist conception of the fact-value distinction and objective knowledge.²⁵³

Is it only ethical concepts?

There seems to be a lack of clarity throughout ELP as to whether his formulation and comments are aimed only at ethical (thick and thin) concepts or non-ethical concepts as well. The ethical certainly seems to be his priority and as outlined above he was clearly influenced by other meta-ethicists, and it may be that his concentration on ethical concepts means that his generalisation from these to all concepts results in the inconsistencies found in his account. When he refers to thick concepts he tends to use the phrase 'thick ethical concepts' and his account argues for a distinction between science and ethics rather than the evaluative and the descriptive. His discussion of objectivity is quite clearly aimed at ethical knowledge and confidence, so it may seem that his account only intends to apply to ethical concepts. The tension arises where he introduces his wider claims and arguments regarding philosophy's tendency to focus on the more general than the specific, i.e. the thick as opposed to the thin. It would be strange if his considerations of how we can be said to go on from one concept to another, and whether we need to share the evaluative viewpoint of a concept to be able to count as a competent user of that concept, applied only to the ethical. Such a view

²⁵¹ Samuel Scheffler, 'Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy' (1987) 96 (3) *The Philosophical Review* 411

²⁵² *ibid* at 412

²⁵³ Chapter six demonstrates the usefulness of thick ethical concepts (utilizing Williams' ideas) for Hart's legal positivism and chapter seven demonstrates their usefulness in understanding the shared, core philosophical concerns addressed in key jurisprudential debates.

would indicate that it is only the ethical that differs across communities, and this does not fit well with the wealth of Williams' work on social explanation.

The above notwithstanding, Williams makes quite clear that he thinks there is a big difference between science and ethics and although there maybe a chance of some kind of ethical knowledge, or confidence, it will be very different from that associated with science.²⁵⁴ Ethical concepts and ethical knowledge are thus presented as being unique and this seems to imply that his formulation is aimed specifically at thick and thin ethical concepts only. Such a claim and approach in his work seems incongruous with the influence of Ryle who clearly had non-ethical descriptions in mind when he discussed the idea of thick and thin description and when he considered concepts.²⁵⁵ It is also counter to the claim that the thin is abstracted from the thick, and that there are some descriptions and concepts that are more specific and some that are more general (as advanced by Hurley).²⁵⁶ Construing thick and thin only in the case of the ethical would be a much narrower interpretation of thick and thin than that advanced by Ryle and, for example, Hurley. Ethical concepts may have been used as a starting point to develop Williams' ideas on concepts (in general) but focusing on the ethical revealed some interesting features of ethical life (such as action-guidance) that dominated his formulation. As will be demonstrated (in this chapter) it is questionable whether his formulation captures the variety of thick ethical concepts sufficiently.

3 - Williams' formulation of thick and thin.

At this point it is useful to present Scheffler's summary of Williams' formulation of thick and thin ethical concepts identifying the features of his formulation that will be expanded and analysed in section four:

Williams distinguishes between two kinds of ethical concepts. First, there is what he calls "thick" or substantive concepts. These are relatively specific concepts (p. 129). They are also "world-

²⁵⁴ For Williams' account of his distinction between science and ethics, and his arguments that ethical knowledge (what he terms convergence) is possible, but not along the same lines as scientific knowledge, see note 225 at 149-151. I address both of these aspects of his work in section four of this chapter.

²⁵⁵ My thesis does not consider in any further detail the relevance to law of Ryle's thick descriptions, because my argument focuses upon the significance of the conceptual distinction between thick and thin.

²⁵⁶ Hurley's centralism and non-centralism are first noted in chapter two and section four of this chapter returns to these ideas and elaborates upon conceptual priority.

guided”: that is, their application “is determined by what the world is like” (p. 129). One of the things this means is that people who have acquired them will typically agree about their application to particular cases (p. 141). Thick concepts are also “action-guiding,” in the sense that “if a concept of this kind applies, this often provides someone with a reason for action, though that reason need not be a decisive one and may be outweighed by other reasons” (p. 140). Examples of thick concepts are ‘treachery’, ‘promise’, ‘brutality’, and ‘courage’ (p. 129). The thick concepts are contrasted with a second group of concepts, which we may call “thin”. The thin concepts are “general and abstract” (p. 152), and they “do not display world-guidedness” (p. 152). Examples of thin concepts are ‘good’, ‘right’, and ‘ought’ (p. 128).²⁵⁷

Scheffler’s statement of Williams’ formulation in his review of ELP is one of the clearest accounts of Williams’ formulation.²⁵⁸ It clearly identifies that there are two sorts of ethical conceptual content (action-guiding and world-guided) that Williams is interested in; that according to Williams thick and thin ethical concepts play a role in providing reasons for action; and that Williams’ work builds on an already existing distinction between ‘specific’ concepts and ‘general’ or ‘abstract’ concepts (such as those identified by Hurley’s centralism and non-centralism). It is important to note that Williams’ formulation (and therefore Scheffler’s quotation above) at no point refers to evaluative or descriptive content in contrast to many other formulations of thick and thin (such as those noted in the previous chapter).²⁵⁹ Despite this difference both the previous chapter and this chapter address the same two questions as they are pertinent to understanding any conceptual distinction based on thickness and thinness:

1. What is the nature of the conceptual content identified by the distinction?²⁶⁰
2. Is the distinction between thick and thin concepts based on a distinction between two different ‘kinds’ of concept?²⁶¹

²⁵⁷ See note 251 at 415. His page numbers are different to mine because he is using a different publication; he cites an earlier edition of ELP: Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, 1985)

²⁵⁸ The reader may be surprised that I am citing Scheffler’s description of Williams’ formulation rather than quoting Williams, but this is because Williams delivers his formulation of thick and thin concepts in a piecemeal fashion throughout chapters seven and eight of ELP.

²⁵⁹ Williams never explicitly refers to evaluative or descriptive content but they are relevant because action-guidance is a form of evaluation and world-guidedness is normally associated with a description’s ability to describe the way the world really is.

²⁶⁰ In this case the distinction is Williams’ formulation and the distinction is between ‘action-guiding’ content and ‘world-guided’ content.

²⁶¹ I am referring to the debate discussed in the previous chapter regarding difference of degree and difference of kind. Conceptual priority will also resurface in this chapter as a part of the discussion of the nature of the relationship between thick and thin concepts.

The literature on Williams and on his formulation is extensive but these two questions identify the key aspects of Williams' work that will be necessary for any useful application of it in law.

Williams' accompanying claims/arguments.

Williams advances his distinction between thick and thin ethical concepts to support his wider arguments and claims regarding the nature of ethics - the two are interconnected so neither can be taken on its own - therefore both are addressed.²⁶² The following is a list of the claims/arguments he advances in chapters seven and eight of ELP that are useful to understanding Williams' account of thick and thin, and that could be relevant to law (this list is not exhaustive).²⁶³

- Ethical theories focus too much on the thin, they do this by reducing the thick down to some thin things that can be applied systematically and form the basis of an ethical theory. Such ethical theories distort the real nature of their subject matter.
- Our ethical lives are much richer and diverse than our ethical theories can accommodate and this is because they focus on the thin, the thick is better at representing this richness.
- The thick is conceptually prior to the thin and the thin can be abstracted from the thick. This links to another of his claims that the thick is better equipped to provide a more stable account of ethical knowledge and life.
- There is more action in the thick, the thick offers a more stable chance of ethical knowledge and confidence because it is thick ethical concepts and the judgements they express that can be said to be true or false and constitute ethical facts.
- Reflection can destroy ethical knowledge; ethical knowledge may be undesirable, ethical confidence is a better aim and this can come from the social sciences rather than ethics.
- The distinction between fact and value is better reformulated as a distinction between science and ethics, because although ethical judgements may never be objective or constitute knowledge in the way that we attribute to science, there can be such a thing as ethical knowledge. The distinction between science and ethics is better at dealing with objectivity and the challenges brought by relativists and realists.

As can be seen from the above list of accompanying claims/arguments Williams has much more to say about thick and thin ethical concepts and ethics (in general) than is

²⁶² Williams' wider arguments and claims encompass a wide variety of topics within ethics such as the nature of ethical knowledge, the nature of our ethical practices, and the nature of ethical disagreement etc.

²⁶³ Williams' accompanying claims/arguments are delivered in a piecemeal fashion throughout ELP, but I have collated these into a series of bullet points.

captured by a definition of his distinction between thick and thin concepts alone (and so this chapter addresses both his definition and his accompanying claims/arguments to the extent that is necessary to understand his distinction between thick and thin concepts). Adopting this approach not only provides a better understanding of Williams (significantly, as we shall see, the legal literature addressed in chapter five makes some key errors regarding Williams because focus is solely on his definition) but it also emphasises the aspects of Williams' account on social explanation that are relevant for social practices such as law.

Law and ethics both exist as part of 'social worlds' and are social practices, in contrast to the kind of objective reality Williams attributes to science, and it is Williams' heavy focus on action-guidance that could be particularly useful for law.²⁶⁴ Previous legal theories have tried to account for this social aspect of law, whilst trying to maintain that the claims of that legal system exhibit some kind of objective authority akin to that associated with scientific knowledge. Williams' wider concerns regarding the tendency to focus on the thin as opposed to the thick and his claim that the thick is more closely linked to our ethical lives warrants further investigation; because a society which focuses on the thin is very different from a society that focuses on the thick. Of course, Williams' concerns regarding overemphasis on the thin are dependent on there being a clear-cut distinction between the thin and the thick, and this is not unanimously agreed upon. Williams' concern prompts an interesting question: has our understanding of legal practices tended to favour thinner or thicker accounts, and if so why? If we have tended to favour one account not only is there space to interrogate this approach, but the bias could also be revealing regarding the nature of thick and thin concepts.

4 - Exposition and analysis.

The previous sections established the breadth of Williams' ideas in ELP, the context of these ideas and his importance as a theorist. The following section details his specific arguments. There is much that could be said on the distinction between thick and thin

²⁶⁴ Williams uses the term 'social worlds' to refer to the difference between the physical world we inhabit of which there is only one possibility and it is the same for all cultures; and the 'social world' which refers to the society or culture we live in. There are multiple possible 'social worlds' but only one possible physical world, for Williams' discussion of this see: note 225 at 166-167

concepts (as advanced by Williams), so discussion is limited to those aspects of his account that are most useful to an application in law.

It is first important to note that Williams' formulation was part of his attack on prescriptivism, hence he made it clear throughout ELP that the kind of evaluative content he was concerned with was 'action-guiding content'. His attack on prescriptivism was part of a wider attack on ethical theory (and ethical theorists), which he believed had been preoccupied with *defining* ethical terms. The focus on definitions in ethics led to (in his opinion) one of the most 'spectacular misnomers': the naturalistic fallacy.²⁶⁵ His criticisms of the naturalistic fallacy are part of his wider attack on those theorists who employed the fact-value distinction, such as in R. M. Hare's prescriptivism. Williams writes:

More recent work has tried to give a better explanation. It takes as central the ban on deriving ought from is. The central view is prescriptivism, developed by Hare, which explains the function of ought in terms of prescribing an action, or telling someone what to do. Ought is seen as being like an imperative: strictly speaking, a statement employing ought used in the normal prescriptive way is a universal expression that entails imperatives applying to all agents in all similar circumstances.... On this interpretation, what I have up to now been calling the evaluative will more revealingly be called the prescriptive, and it is the prescriptive that cannot validly be derived from the other class of statements—a class that, in this contrast, is appropriately labelled the descriptive. The explanation of the ban is now fairly obvious. The prescriptive does something, namely telling people to act in certain ways, which the descriptive, in itself, cannot do.²⁶⁶

Williams' account of thick concepts challenges this prescriptivist account of fact and value and the prescriptivist interpretation of the claim that you can't derive an *ought* from an *is*.²⁶⁷ He preferred to use the term 'action-guiding' as opposed to either 'evaluative' or 'prescriptive' and 'world-guided' as opposed to 'descriptive'. Yet as

²⁶⁵ Williams refers to the naturalistic fallacy as a 'spectacular misnomer' at *ibid* 134. The term 'naturalistic fallacy' was introduced by G. E. Moore, see: G. E. Moore, *Principia Ethica* (first published Cambridge University Press, 1903) where he argued that it was fallacious to reduce goodness to natural properties (or to try to define it in terms of natural properties) such as 'pleasant' or 'desirable'.

²⁶⁶ *ibid* Williams at 137

Williams' work in ELP demonstrates how the literature on thick and thin concepts developed from the meta-ethical debate between non-cognitivists and cognitivists, and it is interesting to note that Hare was one of Williams' graduate supervisors.

²⁶⁷ Williams' work can be understood as continuing the challenges to naturalism and reductionist attempts at reducing all moral judgements to some basic moral concept such as 'good', that was already being voiced by cognitivists at the time.

will be seen throughout the rest of this chapter his formulation of thick concepts in terms of action-guiding and world-guided content is problematic as it does not seem to neatly capture the nature of ethical concepts, which leads to inconsistencies within his account. One such inconsistency that has been noted by critics is that his formulation often fails to capture the wider nature of his critique of ethical theory (in particular prescriptivism).²⁶⁸ The following section takes a more detailed look at Williams' formulation to better illuminate what he meant by 'action-guiding' content and 'world-guided' content.

Recapitulation.

The distinction that needs unpicking is a two-part distinction that distinguishes between two kinds of ethical concepts: thick and thin.²⁶⁹ Thick ethical concepts are defined as being both 'world-guided' and 'action-guiding', whereas thin ethical concepts are only 'action-guiding' because they do not contain 'world-guided' content.²⁷⁰ The application of a thick concept is 'determined by what the world is like' (world-guidedness) and therefore people who have acquired the thick concept will typically agree about its application.²⁷¹ If a thick concept applies it often provides the concept user with a reason for action, although this reason need not be direct and may be outweighed by alternative reasons (i.e. it has action-guidingness).²⁷² Williams follows in the footsteps of Ryle and Hurley by distinguishing thick concepts as

²⁶⁸ T. M. Scanlon, 'The Aims and Authority of Moral Theory' (1992) 12 (1) *Oxford Journal of Legal Studies* 1

²⁶⁹ These are not the only possible ways of distinguishing between concepts, and as demonstrated in the previous chapter not all thick and thin concept theorists are happy with a two-part distinction of thickness and thinness. Some theorists argue that there are multiple levels of thickness and thinness therefore a two-part distinction fails to capture the variety of thick and thin.

²⁷⁰ The terms 'action-guiding' and 'world-guided' seem fairly straightforward but further investigation demonstrates that it is not completely clear what conceptual content Williams meant to capture with these terms. This is elaborated upon by question one: What is the nature of the conceptual content identified by the distinction?

²⁷¹ Agreement and disagreement regarding typical application of concepts (not just thick and thin concepts) has always been a complicated issue for conceptual analysis, although the extent of the complexity of this has only been acknowledged since the 'Classical Theory of Concepts' fell out of popularity (see chapter two). In section five of this chapter when I address Williams' accompanying claims and arguments I return to the discussion of agreement and disagreement in thick and thin concepts.

²⁷² The role of thick and thin concepts in providing reasons for action plays a part in Williams' internal-external reasons thesis, but this aspect of his work requires far more detailed examination than is necessary for a useful application of his distinction between thick and thin concepts in law. I therefore address his ideas on 'reasons for action' only to the extent that they are covered in ELP for a more detailed understanding of his internal-external reasons thesis see: Bernard Williams, 'Internal and External Reasons', in *Moral Luck* (Cambridge University Press, 1981), 101–113

‘specific’ concepts from thin concepts, which are ‘general’ and ‘abstract’.²⁷³ In order to make further progress it is helpful to revert back to the two questions introduced in the last chapter, here canvassed in the particular case of Williams’ approach.

Q 1 What is the nature of the conceptual content identified by the distinction?

Any distinction that clearly distinguishes concepts based on the possession of certain conceptual content (specific features) needs to be able to clearly identify and explain the nature of that conceptual content. What does it therefore mean to characterise something as action-guiding or world-guided? This is the first important question to be answered.

Williams first outlines his distinction between action-guidance and world-guidedness at 143 of ELP:

The way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation, of persons or actions. Moreover, they usually (though not necessarily directly) provide reasons for action.²⁷⁴

Williams asserts a close connection between the action-guiding and world-guided aspects. Eric Wiland notes having a reason to do something doesn’t simply depend upon whether your judgment represents the way the world is independent of you, as it depends in the first place upon whether your reason for action fits well with your pre-existing motives for action. Your reasons for action therefore always depend on your psychology, and so they are not significantly independent from what you want. Williams’ view on thick ethical concepts influences his account of reasons for action and introduces the idea of cultural dependence: whether it is reasonable to act in a certain way is to some extent dependent upon cultural features. This is quite vague and could be interpreted in many ways, but Wiland suggests: ‘Whether a thick ethical concept (courageous, chaste, cruel) can be correctly applied to someone depends not in the first place upon the culture of the person up for ethical evaluation. It depends upon

²⁷³ The distinction between ‘specific’ and ‘general’ concepts advanced by Susan Hurley was addressed in chapter two of my thesis, but I briefly return to this distinction in the context of ELP in section five of this chapter.

²⁷⁴ see note 225 at 143-144

the culture in which the concept has its home and point.²⁷⁵ If reasons operate in the same way thick ethical terms do, then whether an action is reasonable depends upon the culture that gives the concept REASONABLE its point.²⁷⁶ This aspect of Williams' account is often referred to as evaluative standpoint.

Later on Williams adds about action-guidedness:

They're characteristically related to reasons for action. If a concept of this kind applies, this often provides someone with a reason for action, though that reason need not be a decisive one and may be outweighed by other reasons.... Of course, exactly what reason for action is provided, and to whom, depends on the situation, in ways that may well be governed by this and by other ethical concepts but some general connection with action is clear enough. We may say, summarily, that such concepts are "action-guiding."²⁷⁷

It is clear that for Williams, action-guidance is the prime function or perhaps 'foundational point' of both thin and thick ethical concepts, although interestingly he seems unclear as to whether this is the case for all thick and thin concepts.²⁷⁸ Action-guidance is a significant feature of ethical concepts - many ethical thick and thin concepts seem to be practical and active in a way that some non-ethical thick and thin concepts aren't, e.g. CHAIR and GALAXY - but this does not mean that ethical concepts will always guide action, or that non-ethical concepts normally won't or can never guide action. Such a conclusion would be too concrete and would fail to capture the flexibility of our ethical concepts (this indeed is one of the criticisms advanced by many against Williams' account). Action guidance is an important aspect of thick and thin ethical concepts, but it is not the only important aspect. Thus Kirchin writes,

When it comes to the guidance of action, things are trickier when we are not talking of possible courses of action simply because we are not thinking about how to act. When evaluating a person, we might try to guide how others should treat her or refrain from following her lead. But, that need not always happen. Often our aim is simply to express some evaluation.²⁷⁹

²⁷⁵ Eric Wiland, 'Williams on Thick Ethical Concepts and Reasons for Action' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 211

²⁷⁶ Wiland argues that we (Williams' is included here) make the mistake of thinking that the concept REASONABLE is timeless and universal, when it is actually culturally peculiar. He uses the legal concept REASONABLE to demonstrate that this is not a universal legal concept.

²⁷⁷ see note 225 at 155-156

²⁷⁸ On the one hand what he has to say regarding the thick and thin is clearly orientated towards an account of ethical life and practices, but he also makes claims regarding what he perceives to be the flawed tendency of philosophers (not just ethicists) to focus on the thin as opposed to the thick, and this seems to refer to thick and thin non-ethical concepts, as well as ethical.

²⁷⁹ see note 235 at 5

We could be indicating our negative view of someone through our use of a thick concept such as ‘barbaric’ or ‘wicked’, but intend this as a statement about their character in the world-guided way associated with thick concepts and still not intend to guide anyone’s action either directly or indirectly as a result of that judgement. The same could apply to our praise of an institution: it may be that our judgment of that institution as ‘noble’ might be meant simply as an expression of praise, and not an attempt to influence and guide how others treat that institution or view it. There is a valid concern then that Williams’ construction of thick and thin ethical concepts requiring action-guidance (even though he mentions this is only typically their function and that it may be indirect) can force concepts to fit a mould that is not the best fit with their evaluative nature.

Simon Kirchin worries that ‘the link between some evaluative judgements and some actions are so loose and convoluted that it is strained to posit a link. Doing so might reflect only a philosophical prejudice, not the truth of the matter.’²⁸⁰ This might be because our judgement of the person as ‘wicked’ or the institution as ‘noble’ as discussed above was not meant to guide action even indirectly. Or it could be because the individual instance of action-guidance is so weak that it is only when enough people make the same judgement that there could be a direct or indirect reason to act accordingly. The concern being that even if action-guidance is a ‘foundational-point’ of thick and thin concepts and one of the benefits of Williams’ formulation is the attention he draws to the role of action-guidance, categorising everything that is ‘non-world-guided’ in terms of ‘action-guidance’ (as Williams does) misconstrues the reality.

It is interesting to note this problematic aspect of Williams’ formulation because Williams advances a similar criticism against Hare’s prescriptivism. He criticises Hare for forcing all evaluative concepts into a prescriptivist mould:

In saying that anything is good or bad, admirable or low, outstanding or inferior of its kind, we are in effect telling others or ourselves to do something – as the explanation typically goes, to choose something. All evaluation has to be linked to action.

²⁸⁰ *ibid* at 6

This result is not easy to believe. It seems false to the spirit of many aesthetic evaluations, for instance: it seems to require our basic perspective on the worth of pictures to be roughly that of potential collectors. Even within the realm of the ethical, it is surely taking too narrow a view of human merits to suppose that people recognized as good are people that we are being told to imitate.²⁸¹

Williams admits that his formulation when applied in aesthetics leads to an absurd conclusion. As Williams himself points out in the above quotation - aesthetic concepts are not normally related to action-guidance (we don't all behave like art collectors all the time) - they are normally used to voice aesthetic judgements that are reports of how we view the thing aesthetically and reflections of the evaluation carried by the thick aesthetic concept chosen to express this. This could be as simple as whether we like or dislike it, and how it makes us feel.

Despite what I have said above, there are many instances where aesthetic concepts are used to guide action; the point is rather that as with ethical concepts, a construction of these that categorises all the 'non-world-guided' content as action-guiding fails to accurately represent them as a whole. Everyday actions such as choosing what to wear or buy are often based on aesthetic considerations. Indeed the aesthetic can be so important to some individuals that it can cause them to act in a morally questionable way, for example breaking promises or stealing. This can raise questions as to the close proximity between these two spheres of our social lives, which may question the nature of the distinction between ethics and aesthetics. Not only are there problems with Williams' formulation regarding ethical concepts, but also aesthetic concepts, yet interestingly he only seems to be aware of the problem in the case of the aesthetic.

If 'prescription' and 'action-guidance' fail to adequately capture the nature of the evaluative phenomena under consideration, then how do alternative meta-ethical accounts of thickness fare? Accounts of thick and thin posed in terms of evaluation and description (such as those addressed in chapter three) can be equally problematic. They can also construe the terrain too narrowly or too widely. Williams' account seems to imply that action-guidance is a specific feature of ethical concepts, but there are many thick concepts that are not the traditional ethical concepts that we use to guide action, which can still be used in an action-guiding role. For example:

²⁸¹ see note 225 at 138

‘meditation’, ‘turn’, ‘pithy’, ‘industrious’ and ‘tidy’. We could envisage situations where a teacher praises a student for finally succeeding in meditation, a teaching load can be judged as manageable, you may be told it is not your turn and therefore not allowed to do something, a comment could be judged as pithy and we can praise or condemn people for being industrious or tidy. Consider MEDITATION:

The evaluative nature of MEDITATION is more complex than we are used to when thinking about our diet of thick concepts: it is not always used evaluatively, and it need not always be used positively perhaps. Sometimes when it is used evaluatively, this is transmitted because of tone of voice or context. At other times, I think that the concept itself, because of what it is, conveys evaluation. My claim is that many concepts work like this. Without this insight they would be mistakenly classed as (mere) thick descriptions because our notion of a thick concept is limited.²⁸²

The way the evaluative or action-guidance aspect of a thick concept is construed may not only distort our understanding of our conceptual practices (could lead to inadequate accounts of thick and thin concepts and the false identification of some concepts as thick descriptions); but it could also result in significant misunderstandings of our language practices.

It should be made clear though that there does seem to be a difference between terms such as ‘meditation’, ‘turn’, ‘pithy’, ‘industrious’ and ‘tidy’; and terms such as ‘honesty’, ‘brave’ and ‘deceitful’. We would not normally consider the former concepts to be evaluative in the same way as the latter. There seems to be something different about these evaluative concepts that the literature wishes to isolate. Some theorists have described the latter concepts as wearing their pro or con evaluation on their sleeves, whereas the non-traditional examples I gave (‘meditation’, ‘turn’, ‘pithy’ etc.) are not typically evaluative and therefore often classed as not being ‘essentially evaluative’. In both cases of a concept’s context, tone of voice and qualifiers may play a key role in directing the evaluation.²⁸³

²⁸² see note 235 at 17

²⁸³ Many wish to keep two things apart when it comes to concepts: content and function. I agree there is a clear difference between what the concept’s content (meaning) is and how it is used, and I think there are some concepts where it is stretching the point to argue that they are evaluative even in the loosest sense, because they have been used in a positive or negative fashion. What I wish to indicate though, is that the range of evaluative concepts is much wider than we first thought and this is often only brought out when they are used in particular ways and situations.

However this evaluative phenomena is identified it seems clear that the nature of evaluation is far more complicated than many accounts of thick and thin allow. This complexity may require a degree of flexibility that is not there in accounts that try to construe all types of evaluation under broad headings, such as Williams' 'action-guidance'.

World-guided content.

Similar problems arise regarding world-guided content, which can be just as problematic and similarly fail to capture the nature of this aspect of thick concepts. Williams outlines world-guidedness at 155 of ELP:

At the same time, their application is guided by the world. A concept of this sort may be rightly or wrongly applied, and people who have acquired it can agree that it applies or fails to apply to some new situation. In many cases the agreement will be spontaneous, while in other cases there is room for judgement and comparison. Some disagreement at the margin may be irresolvable, but this does not mean that the use of the concept is not controlled by the facts or by the users' perception of the world. (As with other concepts that are not totally precise, marginal disagreements can indeed help to show how their use is controlled by the facts.) We can say, then, that the application of these concepts is at the same time word-guided and action-guiding.²⁸⁴

The world-guidedness of Williams' notion of thick concepts might be thought of as a contrast between the greater empirical content of thick concepts when compared to thin concepts. This would mean that a concept is world-guided to the extent that determination of its correct applicability is achieved by the empirical (physical and psychological) features of a situation.²⁸⁵

Scheffler (with others) raises concerns regarding the determination of world-guidedness: 'Williams says that one characteristic of world-guided concepts is that people who have them typically agree about their application in all but marginal cases.

²⁸⁴ see note 225 at 155-156

²⁸⁵ Scanlon claims that such an understanding of world-guidedness casts doubt on the significance of the distinction between thick and thin concepts. T. M. Scanlon, 'Thickness and Theory' (2003) 100 (6) *The Journal of philosophy* 275. Scheffler makes a similar argument – Williams deals with moral concepts that all seem to have a considerable amount of empirical content, so any contrast between thick and thin concepts based on empirical content can at best only be one of degree. Samuel Scheffler, 'Morality through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy' (1987) 96 (3) *The Philosophical Review* 411. Scanlon also discusses ELP in his: T. M. Scanlon, 'The Aims and Authority of Moral Theory' (1992) 12 (1) *Oxford Journal of Legal Studies* 1

However he explicitly denies that agreement is sufficient for world-guidedness, and he does not seem to regard agreement as strictly necessary either.²⁸⁶ If this is the case then what does determine world-guidedness? We are left unsure. Agreement or disagreement and specificity or generality are matters of degree and they do not necessarily have to coincide, so this can make matters rather complicated.

Using the term world-guided to refer to their content suggests that such content and any subsequent distinction between thick and thin concepts is in part due to a kind of objectivity – the judgements expressed by thick concepts express knowledge in virtue of their thickness, because they make claims about the way the world is that is guided by the way the world actually is. Yet, how do we determine the way the world ‘actually’ is with any accuracy? Williams never really answers this question but when responding to an imagined challenge from non-cognitivists he throws doubt on the objectivity of ethics in two ways. First, he argues that there is no reason to believe that there is a descriptive concept that picks out the same features of the world as its counterpart world-guided thick concept,²⁸⁷ and second, he argues that understanding the evaluative standpoint of a thick ethical concept is crucial to its application. Both of these claims cast doubt on the objectivity of thick concepts, because any claims for objectivity could not be based only on the role of world-guidedness in their application, as they would also have to be applicable to the evaluative judgments that determine their ethical shape.²⁸⁸

Williams’ use of world-guidedness creates problems for his account in another way too, because it raises the question: what is the minimum amount of world-guidedness required for a concept to be a thick concept as opposed to a thin concept? This question seems to be hard for Williams to answer and his lack of response is what has led many to disagree about the nature of the distinction he poses between thick and thin concepts – whether it is based on a difference of kind or a difference of degree. For

²⁸⁶ *ibid* Scheffler at 418

²⁸⁷ It is this aspect of Williams’ account that leads Jonathon Dancy to attribute to Williams the ‘standard view’ on thick concepts. ‘An honest man is not a truth-respecter and good, but a truth-respecter and good for being so. The evaluation, therefore cannot be peeled off from the description so as to stand as independently comprehensible. But neither can the description be peeled off from the evaluation, if we are dealing with a genuinely thick concept. The leading feature of the thick was supposed to be that the descriptive “side” is not independently comprehensible.’ Jonathon Dancy, ‘In Defense of Thick Concepts’ (1995) 20 (1) *Midwest Studies in Philosophy* 263

²⁸⁸ Scanlon has argued that this suggests not only a difference of degree as opposed to kind regarding empirical content, but a difference of degree regarding content (of any kind). See: T. M. Scanlon, ‘Thickness and Theory’ (2003) 100 (6) *The Journal of philosophy* 275

example many concepts that are deemed thinner than thick concepts seem also to be determined (at least to some extent) by what the world is like. Consider for example ‘pro’ or ‘con’ - the thinnest thin concepts, and then consider the thicker (but still thinner than our traditional thick concepts) ‘good’ and ‘right’. Then consider the more traditional thick(er) ethical concepts ‘justice’ and ‘fairness’, which are thicker again than ‘pro’ and ‘con’, and ‘good’ and ‘right’, but still relatively thin in comparison to many other concepts. Distinguishing between all of these requires at least some level of world-guidedness. It also seems odd to think that these concepts through a lack of world-guidedness are somehow not quite ‘in the world’ in the same way thicker concepts are.²⁸⁹

Q 2 Is the distinction between thick and thin concepts based on a distinction between two different ‘kinds’ of concept?²⁹⁰

Scheffler argues in a review of ELP that Williams is wrong to insist on a two-part ‘kind’ distinction, as opposed to a continuum of degree between thick and thin. This seems to indicate that Williams’ writing suggests a difference of kind as opposed to degree. One of the main inconsistencies in Williams’ account is whether his two-part distinction indicates a difference of kind or a difference of degree. His non-separationism surely indicates a difference of degree but he never explicitly states his non-separationism - it is instead hinted at through his choice of language (thereby leaving matters still unclear). Kirchin’s work is helpful here, because he reminds us that a difference of kind could still contain interesting divisions, and be more complex than a two-part distinction. A difference of kind could contain multiple divisions within each category; so for example there could be five different levels of thickness contained within the thick concept category, and five different levels of thinness

²⁸⁹ Christine Tappolet argues that Williams seems to have followed the path of a clear separation between thick and thin concepts, she proposes an account based on a difference of degree that interprets the relationship between general concepts such as GOOD and the more specific ethical concepts (cited as thick concepts by Williams) akin to the relationship between determinable and its determinates. ‘As we have seen, Williams claims that thick concepts are both descriptive and prescriptive, while thin concepts are merely prescriptive. This is incompatible with the view that good pro tanto is a kind of determinable. Consider the colour case and suppose that the concept red has a descriptive content. If so, it will be impossible that the concept coloured lacks a descriptive content. For being coloured is nothing but to possess one or the other particular colour. So, if being red or being blue consists in falling under a descriptive concept, the same will be true in the case of being coloured. Thus, if Williams is right to say that specific evaluative concepts are at least partly descriptive – and I think he is right – he has to say the same of thin concepts.’ Christine Tappolet, ‘Through thick and thin: ‘good’ and its determinates’ (2004) 58 (2) *Dialectica* 207, 218-219

²⁹⁰ I am referring to the debate discussed in the previous chapter regarding difference of degree and difference of kind.

contained within the thin concept category. Even if the difference between *these* five (or whatever) levels of either thickness or thinness was one of degree, the distinction between a *thick* or *thin* concept could still be a difference of kind. Of course, this would mean there has to be a clear distinction between thick and thin, so that a concept could be classed as one kind of concept – thin – as opposed to another kind – thick – and unfortunately this does not seem possible.

Williams argues that the connotations and associations involved in thick concepts are stronger than those involved with thin concepts, but this does not mean that there aren't any connotations or associations involved with the thin. If it is possible to successfully demonstrate that there are connotations and associations involved with the thin also, then this may indicate a difference of degree as opposed to kind. The distinction between good and right is a prime example of this, because both are thin, although I would argue that good is thinner than right, but right indicates that it is the one option that should be selected, whereas good indicates that it may be one of many options. Good and right both involve pro and con (the barest possible evaluations), and if they didn't then it would be impossible to distinguish good things from right things. The extra information added to pro in the examples of good and right seems to operate comparatively; i.e. it is done on the basis of how different options are viewed, for good and right are different positive judgements. Some could argue this is indicative of a difference of kind, because thick concepts are normally considered to provide connotations and associations about the object they categorize in a way that extends beyond purely positive (pro) judgement or negative (con) judgement.

Williams' account of thick and thin ethical concepts focuses mainly on the thick and doesn't explicitly indicate whether he thinks there are also associations and connotations involved with the thin. This is partly because his account of thick concepts is advanced to demonstrate wider claims about ethical objectivity and confidence that he deems inappropriate to attribute to the thin.²⁹¹

²⁹¹ I return to this in more detail in the next section of this chapter.

5 - Williams' wider claims and arguments.

This section moves away from Williams' formulation of his two-part distinction turning instead to the context of this distinction – the wider claims and accompanying arguments – that are important to fully understand his distinction between thick and thin concepts.²⁹² In brief the following points emerging from Williams' work are significant here (subsequent key features of Williams' perspective are treated under further bullet points below):

- Ethical theories focus too much on the thin, they do this by reducing the thick down to some thin things that can be applied systematically and form the basis of an ethical theory. Such ethical theories distort the real nature of their subject matter.
- Our ethical lives are much richer and diverse than our ethical theories can accommodate and this is because they focus on the thin, the thick is better at representing this richness.
- The thick is conceptually prior to the thin and the thin can be abstracted from the thick. This links to another of his claims that the thick is better equipped to provide a more stable account of ethical knowledge and life.

Scheffler states, 'Williams sees the leading contemporary ethical theories, whether deontological, contractualist or utilitarian as neglecting the thick ethical concepts in favour of the thin. And he does not regard this as a matter of simple omission or incompleteness. Rather, he claims, it is due to the fact that all of these theories are the products of reductive enterprise'.²⁹³ Williams claims the thick is more closely linked to our practices and the way the world is, hence in his account only the thick and not the thin are said to contain world-guided content.²⁹⁴ He argues that we have specific evaluative concepts that directly attach to actions and objects and help us categorize our experiences accordingly; and then we have 'more abstract' concepts that we derive from these thicker concepts. This is why ethical knowledge (or confidence) is more likely to be gained by focusing on the thick.

He argues that theorists are driven by a desire to show that one kind of ethical consideration is basic and that all other types can be explained in terms of it. Ethical

²⁹² Throughout this section I refer to the list of accompanying claims/arguments stated in section three of this chapter (and where useful group related claims/arguments together). All bullet pointed statements are from this earlier list of Williams' accompanying claims/arguments, previously stated in section three.

²⁹³ see note 229 at 415

²⁹⁴ see note 225 at 155-156

theory therefore tries to look for the more general notions that could be used as a basis to systematize as many cases as possible. The reductionist aim is contradictory to the idea of the variety of evaluation advanced by the thick. In Williams' opinion such reductive ethical theories are committed to imposing an oversimplified structure on ethical thought and (therefore) the explanations they generate of our ethical lives substantially fail to capture the richness of those ethical lives. Both he and Ryle instead argue that the thin is abstracted from the thick and this is quite different from a reduction down to supposedly constituent parts. It is the specificity of the thick and the link thick concepts have to world-guidedness (in Williams' view) that leads Williams to wonder why we focus on the thin, when thinness lacks both of these and is instead very abstract. Williams argues that a society that focuses on the thin will be remarkably different from one that focuses on the thick.²⁹⁵

Williams is making two different but related claims and this leads Scheffler to consider whether 'there is a tension in Williams' account between them; that is, first, the claim that the morality system dominates contemporary ethical thought outside philosophy and not only within it, and second, the claim that our actual ethical lives are richer, more variegated, "thicker" than the morality system can acknowledge.'²⁹⁶ Scheffler cites this tension because Williams claims the morality system is not an invention of philosophers, but a feature of the modern world in general. So that although different social worlds could be considered to have different morality systems, each of these systems is a feature of the relevant social world, not a creation imagined by the philosophers working within it. Williams also argues that thick concepts have "less currency" in modern society and that 'a society that relies on general expressions is very different from one that puts greater weight on more specific ones.'²⁹⁷ This view effectively leads to the conclusion that at present we live in the thinnest social world, to date. Yet, on the other hand he consistently claims that the morality system and the ethical theories generated under it fail to capture the richness and variety of ethical thought and practice. Williams clearly doesn't think there is any inconsistency here, but he certainly needs to explain further how a morality system that in his opinion precludes the generation of thickness, can have generated it to such an extent that explications of it can be criticised for failing to adequately capture this. Williams

²⁹⁵ For Williams' discussion of the linguistic turn in philosophy see: *ibid* at 142

²⁹⁶ see note 229 at 415

²⁹⁷ see note 225 at 141-142

responds by allowing that the morality system exercises a strong influence on contemporary ethical life, but that this is not strong enough to remove the hold that some other thicker strands of ethical thought and their accompanying thick ethical concepts, have over us. 'Thus, the claim may be, that our ethical lives, thin as they are, are still sufficiently thick that the morality system manages to misrepresent even them.'²⁹⁸

Scheffler's consideration of the difference between the thin and the thick as advanced by Williams has wider implications for Williams' account. Arguing that focus has been on one rather than the other (i.e. that it has been on the thin) is based on the assumption that there is a fairly clear distinction between these two (thick and thin) and as the previous section demonstrated this is controversial.

Recall Kirchin's observation:

Consider the following concepts, for example: justice, fairness, and impartiality, to take one cluster of notions; liberty, equality, freedom of expression to take another; privacy, self-respect, envy, to take a third; needs, well-being, and interests to take a fourth; and rights, autonomy, and consent for a fifth. Are the concepts on this list thick or thin?²⁹⁹

If they are all thick, then presumably Williams' criticism fails and contemporary ethical theories are far more concerned with thick concepts than he allows, because a cursory glance of any ethics textbook would reveal theories concerned with all the concepts listed above. Alternatively, if all the concepts on the list are thin, then the class of thin concepts extends far wider than Williams perceives and is much richer than his account suggests. So, even if ethical theories do concern themselves with the thin more than the thick, this finding would not necessarily lead to the oversimplification and distortion of ethical life he earlier alleged. And if *this* is so his social argument loses considerable force and leads to doubts about whether he can confidently claim that the thick is more closely connected to our ethical lives and that the thick provides a better chance for ethical knowledge or confidence. It may be that all Williams can legitimately claim is that the thick represents the complexity of our

²⁹⁸ see note 229 at 416

²⁹⁹ *ibid* at 417

ethical lives better, because these concepts are, by definition, richer more fine-grained and complex ethical concepts.³⁰⁰

- There is more action in the thick, the thick offers a more stable chance of ethical knowledge and confidence, because it is thick ethical concepts and the judgements they express that can be said to be true or false and constitute ethical facts.

Williams' ideas on thick and thin are discussed in the context of a response to relativism, and this is partly because he believes that it is thick ethical concepts that offer the best hope for ethical knowledge or confidence.³⁰¹ Williams conceives that it is relativism that causes us to lose confidence in our ethical practices and claims in the first place. Thick ethical concepts are not able to satisfy the relativist's challenge completely, but they nonetheless provide a better chance of doing so than the thin. This advantage relates to Williams' distinction between science and ethics and his claim that ethics operates in a different reality to the scientific, because there are competing 'social worlds' and our ethical practices - and therefore knowledge claims - have to be understood as a part of the social world (reality).³⁰²

An immediate relation can be found between the foregoing account of Williams' view and matters of interest in contemporary legal theory. Thus Williams' discussion of relativism and objectivity relates closely to recent discussions of legal objectivity. A challenge for any legal system (domestic or international) is to account for legal judgements as a source of authority, which issues also bear at another level in disagreements between different judges all trying to decide the same case. Williams is interested in social explanation and he is concerned that one of the things holding ethical knowledge back is a lack of authority to say that any one account is better (or is the right account) as opposed to another objectively speaking. Law and ethics both operate as social practices and this is something that any account of legal objectivity needs to consider. For example, legal positivists attempt to bring certainty and objectivity to law by construing the legal sphere as a reality that is much closer to that of the scientific than social, but Williams suggests that rather than asking "is this a method of finding our way around the social world?" we should ask "is this a good

³⁰⁰ Even if some of the concepts on the list could be classified as thick and others thin, this still raises some of the concerns I have just elicited above.

³⁰¹ see note 225 at 172-173

³⁰² *ibid* at 166-168

way of living compared with others?"; or, to put it another way, "is this the best kind of social world?"³⁰³ This is an interesting question to ask of law.

- Reflection can destroy ethical knowledge; ethical knowledge may be undesirable, ethical confidence is a better aim and this can come from the social sciences rather than ethics.

Williams poses the scenario of a 'hypertraditional' society in which the people use their thick concepts unreflectively, as a way of navigating their social world.³⁰⁴ Within that particular social world, the judgements they make using their thick concepts can amount to a kind of ethical knowledge and a form of justified true belief. It is only when they are presented with an alternative social world that navigates differently, so-to-speak, that they start to doubt their own practices and question their knowledge. The 'hypertraditional' society could therefore possess ethical knowledge at an unreflective level but ethical reflection may destroy this ethical knowledge or at least substantially decrease their confidence in these ethical knowledge claims. Williams states it is important to be quite clear what ethical knowledge is in question (reflective or unreflective) within the 'hypertraditional' society: 'It is the knowledge involved in their making judgments in which they use their thick concepts. We are not considering whether they display knowledge *in using those concepts rather than some others*: this would be an issue at the reflective level.'³⁰⁵ As soon as we stand back from our ethical practices and our concept use, and ask whether it is the right way to go on in that particular social world (Williams doesn't think it makes sense to ask this of a different society that is too far removed from our own social world), then we are questioning the ethical knowledge of the thick concepts users at a reflective level, and it is at this level which Williams concedes 'they certainly do not possess knowledge.'³⁰⁶ Engaging with this reflective enterprise can lead to a loss of confidence in our ethical knowledge and concepts. If this lack of confidence is serious enough it can lead to the permanent loss of that knowledge, because when those members of the 'hypertraditional' society cease to make judgements using those concepts they no longer possess the kind of unreflective ethical knowledge Williams has in mind - 'the knowledge involved in their making judgments in which they use their thick concepts.'³⁰⁷ Ethical reflection

³⁰³ see note 225 at 166-167

³⁰⁴ *ibid* at 158-164

³⁰⁵ *ibid* 163

³⁰⁶ *ibid*

³⁰⁷ *ibid*

impedes our ability to use thick concepts because it raises the notion of other potentially better ways to “go on”, and this undermines our confidence in our own method. Although we cannot go back to an unreflective time, reflective ethical knowledge is not the only possible kind of ethical knowledge, Williams suggests that we could instead ask: ‘whether members of the society could, in exercising their concepts, express knowledge about the world to which they apply them, and the answer to that might be yes.’³⁰⁸ Williams suggests that unreflective ethical knowledge is to be located within our repertoire of thick concepts and our subsequent use of them, but can thick concepts hold up to reflection? Williams argues that there are some thick ethical concepts that can stand up to reflection, and it is these thick ethical concepts that ensure the survival of some ethical knowledge at the reflective level, even if the residue is less than we originally believed we might possess, and this survival is sufficient to give us ethical confidence.³⁰⁹

Surprisingly, Williams’ final advice on the matter is that we should rethink entirely our quest for ethical knowledge because ethical confidence is more desirable than ethical knowledge. It may seem ridiculous to suggest that we could ever have confidence in our ethical practices, without perceiving this confidence to be on the grounds of some kind of ethical knowledge (even if it was mistaken on our part). However, Williams argues that the confidence in our ethical practices is to be found outside of ethics, in the social sciences and the humanities. This final point is particularly interesting and potentially promising in helping to articulate or sum or even determine between accounts of legal objectivity.

Valerie Tiberius agrees with Williams’ suggestion that ethical confidence in our desires and ideals is more advantageous and proceeds to argue for a way of thick theorizing that shores up our confidence in our ethical concepts, so that ethical reflection of a certain kind can increase our confidence in terms such as ‘wisdom’ and ‘well-being’.³¹⁰ One worry about Williams’ view on this count is that perhaps thin ethical concepts might be able to deliver the same outcomes. However, thick concepts do have some advantages over the thin here; their complexity gives theorists a lot of

³⁰⁸ *ibid*

³⁰⁹ Williams never actually specifies which thick concepts he has in mind here, so it is unclear which thick concepts could be robust enough to hold up against reflection.

³¹⁰ Valerie Tiberius, ‘Well-being, Wisdom, and Thick Theorizing: on the Division of labor between Moral Philosophy and positive Psychology’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013)

substance to work with and a wider variety of related commitments to appeal to. Yet Tiberius argues that the biggest advantage of thick theorizing is also a disadvantage and has to do with scope:

When we construct theories that speak to people's actual commitments, ideals, and values in fundamental ways, we are more likely to construct theories that are action-guiding, reason-giving, and persuasive, theories that can underwrite the sort of confidence Williams thinks is missing in our reflective age. But when we draw on people's actual commitments, ideals, and values to construct theories, we also open ourselves to the charge that our theories will only apply to those who actually share these commitments.³¹¹

Tiberius' observation is helpful, but in fact two different but related problems of scope need to be distinguished. First, there will be people to whom our theory does not apply, and second, this lack of scope may then undermine the confidence in the theory for those to whom it does apply. What really seems to be the issue though is that the ethical views and concepts of the people for whom the theory doesn't apply might represent a better way of "going on", even if this is the case it would only leave us in the position of wanting to revise our own theory or reject it entirely.

J. E. J. Altham³¹² argues that Williams' core claim (that we have some limited ethical knowledge that is sustained by confidence in our ethical practices) conflicts with another of his claims; i.e. that we have ethical knowledge through our use of thick ethical concepts. Altham and Alan Thomas both agree that the combination is unstable - it requires confidence to be capable of performing two incompatible roles: 'to supplement thin, non-world guided commitments in their application and also, when we have thick concepts, to give us confidence in continuing to be committed to them when we know that others have incompatible sets.'³¹³ Thomas also worries that modernization has led to a corrosive reflectiveness that erodes our thick ethical concepts whilst simultaneously demanding an increased transparency and truthfulness from them. Ethical confidence may be our best hope, but it will not restore the thick ethical concepts we have already lost and it cannot guarantee the sustainability of those we currently have.

³¹¹ *ibid* at 229

³¹² J. E. J. Altham and Ross Harrison, *World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams*, (Cambridge University Press, 1995)

³¹³ Alan Thomas, 'Maxims and Thick Ethical Concepts: Reply to Moore' available as a pdf <www.logical-operator.com/ReplytoMoore.pdf> accessed 20 November 2012

- The distinction between fact and value is better reformulated as a distinction between science and ethics, because although ethical judgements may never be objective or constitute knowledge in the way that we attribute to science, there can be such a thing as ethical knowledge. The distinction between science and ethics is better at dealing with objectivity and the challenges brought by relativists and realists.

The subject of the humanities is human thought and it therefore requires a human point of view, one that is infused with the culture and values of that particular social world. This is why scientific knowledge is very different from any potential ethical knowledge, since scientific knowledge will be ‘true’ or ‘false’ so-to-speak across all social worlds, because there is only one scientific reality. Whereas the variation we see across different societies in terms of their ethical beliefs is a reflection of the multiple social worlds that exist. Thus we can choose, or at least shape our social world; the same cannot be said for science. Therefore an account of ethical knowledge asks whether a particular judgement could be viewed as ‘true’ or ‘false’ in that particular social world and as a piece of ethical knowledge, not across all social worlds. This also explains (in Williams’ view) why the dominant ethical judgements about a particular thing can also be subject to change throughout the history of a particular social world.

It is Williams’ work in social explanation that furthers his distinction between ethics and science, and discusses his idea that ethics operates within a different realm to the scientific. His explanation (that multiple social systems are the result of multiple social worlds, and will therefore necessarily have to be accommodated within any account offering objective grounding to the knowledge claims it produces) is something that could be particularly illuminating to accounts of legal objectivity. Like ethics, law has to account for the perspectival nature of legal thought; judicial disagreement is a prime example of this and has yet to be convincingly reconciled with accounts that assert one legally ‘right’ answer.³¹⁴

³¹⁴ see note 225 at 165 -166

6 – Williams’ popularity.

The above discussion of Williams’ thick ethical concepts in ELP has been specifically limited to those aspects that appear to have a ready application in law. Williams’ formulation has been widely adopted by those working on thick and thin concepts outside ethics (e.g. legal theorists) but this begs the question why William’s formulation of thick and thin is not more popular with ethicists. The following discussion addresses the contestation prompted in meta-ethics by the reception of Williams’ work.

Williams has a very specific notion of thick and thin concepts, and both world-guidedness and action-guidance is key to this, as picked out in the preceding discussion. The ethical is more overtly linked to action-guidance than other spheres, such as aesthetics or epistemology, but both ethical and non-ethical concepts are not only concerned with action-guidance. So it may be that Williams’ sharp focus on action-guidance leaves meta-ethical readers uncomfortable, because even in the case of the ethical where he might be most justified to focus so sharply on the role of action-guidance, this focus seems to ignore a large aspect of the role of ethics and ethical judgements. Williams does allow in his formulation that they only typically guide action and that this, may be indirect, but he fails to elaborate on this and the rest of his account is so heavily focused on action-guidance, that it seems more like an escape clause than an explanation of the relationship between reasons and action-guidance.

World-guided and action-guiding content are tricky to define (Williams’ explanation is brief), but so are descriptive and evaluative content (and these remain popular). It seems tricky to define descriptive and world-guided because if we take these to mean content that is used to describe, this leaves many moral theorists (especially cognitivists) unsatisfied. There is a concern that some of the more abstract concepts that under Williams’ formulation are presented as lacking world-guidedness, such as GOOD, seem to be just as much in the world, guiding our use of them, as thicker concepts such as TREACHERY. The concern is that if concepts such as GOODNESS and CHASTITY are both as good as each other at describing the world (even though GOODNESS is generally seen as thin or at least thinner than CHASTITY), then the distinction between thick and thin concepts needs to be based on something more substantial than the claim that thick concepts contain world-guided content (describe

the world or some aspects of it) unlike their thin counterparts (where any possible world-guided content is minimal).

It is worth noting that although most meta-ethicists do not use Williams' formulation of thick and thin concepts (Jonathan Dancy and Christine Tappolet work with formulations similar to Williams'), Williams' formulation is still a talking point for discussions of thickness and thinness. Williams' formulation may have fallen out of popularity (within ethics), but his work and influence certainly have not.³¹⁵ There may be problems with his specific formulation of thick and thin concepts, but his account illuminates many issues and highlights many more interesting facets of the debate that need consideration.³¹⁶ As the legal literature on thick and thin demonstrates, Williams' work is still popular as a starting point for discussion of thick and thin.

The critical nature of the above discussion may seem contrary to the claim that thick and thin could be useful in law (using Williams' formulation) but the problems highlighted above are part of the wider problems of conceptual analysis (and therefore also applicable to any account of thick and thin).³¹⁷ Any criticisms of Williams (such as those advanced above) are countered with the caveat that even the sections of Williams' work that are least persuasive are to be valued. 'His explicitness and argumentative ingenuity focus the issues more sharply, and at greater depth, than any comparable work I know. The writing, here and throughout, is compressed and energetic, and there is much incidental pleasure to be had from striking observations and neat turns of phrase.'³¹⁸

³¹⁵ A recent conference celebrating thirty years since the first publication of ELP aims to explore the ways in which ELP remains to be an under-utilised and under-explored philosophical tool for ethical thought both within the analytical tradition in philosophy and beyond. The conference '30 Years of Bernard Williams' Ethics and the Limits of Philosophy' was held at the Department of Philosophy, Oxford University, 3rd - 5th July 2015.

³¹⁶ Many meta-ethicists note the importance of ELP and the distinction between thick and thin concepts. It is not Williams' ideas but his specific formulation of thick ethical concepts and thin ethical concepts that seems to be problematic. Simon Kirchin opines that it is 'too concrete and narrowly discrete, something that goes against the spirit of his writings.' see note 235 at 6

³¹⁷ In chapter two I charted the demise and resurgence of the classical theory of conceptual analysis in analytic philosophy; conceptual analysis has also undergone a resurgence in philosophy of law and this study argues that conceptual analysis is still a useful method for philosophical analysis in law.

³¹⁸ McDowell neatly concludes at the end of his review of ELP. See: John McDowell, 'Critical Notice of Bernard Williams' *Ethics and the Limits of Philosophy*' (1986) 95 *Mind*, 377, 386

7 - Conclusion.

This concludes the exposition of the meta-ethical literature on thick and thin concepts, which provides the philosophical grounding of this thesis. The aim has been to chart key aspects of the development of thick and thin concepts, and in particular Williams' formulation of thick and thin concepts, as it will be the operating definition of thick and thin in this study. Having articulated and defended my choice of Williams' formulation the following chapters of my study draw analogies from his formulation and wider ethical claims. The next five chapters note the relevance and usefulness of Williams' ideas (as discussed in this chapter) for three aspects of substantive law: legal concepts, legal theory and specific jurisprudential debates (all three involve conceptual analysis); and for philosophy of education (with a particular emphasis on legal education). Sometimes these chapters will not make explicit reference to Williams' work, but it is important to note that all the legal literature addressed in the next five chapters at least cites Williams on thick concepts (many cite Williams as the original source of thick ethical concepts), and his influence can clearly be seen in the legal literature on thick and thin concepts as elsewhere in other disciplines.

Chapter Five: Thick and Thin in Law

1 – Introduction.

Legal concepts are not human independent phenomena, they are constituted by our practices, goals, values and beliefs, and so these concepts aren't purely descriptive and neither are the legal judgments that employ them. Our legal judgments do not aspire to be reflective of reality in a mind-independent way, free from practices, values, beliefs and goals.³¹⁹ The distinction between thick and thin concepts captures many of these features of legal concepts and has the potential to elucidate the nature of legal concepts and legal judgments,³²⁰ but the distinction has only really gained popularity and received serious attention in legal theory since the beginning of the 21st century.³²¹

Lawrence Solum³²² notes: 'of course, there are many thick ethical terms. For law students, the really interesting thing is that many legal concepts are closely related to

³¹⁹ H. L. A. Hart and his critics debated the extent to which legal positivism (the theory which is normally attributed with the claim that legal rules and judgments are purely factual or descriptive statements) can accommodate the evaluative aspects of legal practice, and therefore considered whether our legal judgments are reflective of reality in a mind-independent way.

³²⁰ Heidi Li Feldman argues that whilst contemporary philosophers have been examining concepts that combine evaluation and description since the mid twentieth century (see the literature by Philippa Foot, Iris Murdoch and G.E.M. Anscombe) law has only started to address this conceptual phenomena after Williams' coinage of the term 'thick ethical concept'. The legal literature is still in its infancy in comparison to the philosophical literature, but there are now seminal legal theorists advocating the usefulness of thick and thin concepts in law. Feldman opines this in three of her articles relating to thick concepts, see: Heidi Li Feldman, 'Appellate Adjudication as Conceptual Engineering' in Graham Hubbs & Douglas Lind (eds), *Pragmatism, Law and Language* (Routledge, 2014); Heidi Li Feldman, 'The Distinctiveness of Appellate Adjudication' (2012) 5 *Washington University Jurisprudence Review* 61; and Heidi Li Feldman 'Objectivity in Legal Judgment' (1994) 92 (5) *Michigan Law Review* 1187.

³²¹ After attention from the following notable legal theorists, see: Joseph Raz, 'Notes on Value and Objectivity' in Brian Leiter (ed), *Objectivity in Morality and the Law* (Cambridge University Press, 1999); J. E. Penner, 'Common Law Cognition and Judicial Appointment' (2001) 38 *Alberta Law Review* 683; J. E. Penner, 'Legal reasoning and the authority of law' in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003); Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011); Heidi Li Feldman, 'The Distinctiveness of Appellate Adjudication' (2012) 5 *Washington University Jurisprudence Review* 61; Lawrence B. Solum & Linghao Wang, 'Confucian Virtue Jurisprudence' in Amalia Amaya & Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing, 2013); David Enoch and Kevin Toh, 'Legal as a Thick Concept' in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013); Heidi Li Feldman, 'Appellate Adjudication as Conceptual Engineering' in Graham Hubbs & Douglas Lind (eds), *Pragmatism, Law and Language* (Routledge, 2014)

³²² Solum is a contemporary virtue ethicist hence his emphasis on their usefulness regarding the fact-value distinction, but there are other reasons for their importance in law and I address these over the next three chapters. See: Lawrence B. Solum, 'Pluralism and Modernity' (1990) 66 *Chicago Kent Law Review* 93; Lawrence B. Solum & Colin Farrelly (eds), *Virtue Jurisprudence* (Palgrave Macmillan, 2008); Lawrence B. Solum, 'Virtue Jurisprudence: A Virtue-Centred Theory of Judging' (2003) 34 *Metaphilosophy*, 178; Lawrence B. Solum, 'Virtue Jurisprudence: Towards an Aretaic Theory of Law' in Liesbeth Huppel-Cluysenaer & Nuno M.M.S. Coelho (eds), *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (Springer, 2013); and Lawrence B. Solum & Linghao Wang, 'Confucian Virtue Jurisprudence' in Amalia Amaya & Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing, 2013)

(or are themselves) thick ethical terms.³²³ Thick legal concepts include MURDER, RAPE, THEFT, WOUNDING, CRIMINAL DAMAGE, FRAUD, DANGEROUS DRIVING and THREATENING BEHAVIOUR.³²⁴ The popularity of the terms ‘thick’ and ‘thin’ and the variety of applications of these terms is ever increasing in law, the terms ‘thick’ and ‘thin’ have also been used within law in relation to descriptions and moral arguments (although this study specifically focuses on thick and thin concepts).

Those legal theorists who use thick and thin in a descriptive manner describe varying levels of thickness and thinness demonstrated/exhibited/possessed by a particular aspect of law.³²⁵ These descriptive uses of thickness and thinness do not refer to the distinction between thick and thin concepts in any way. In addition to this there are those legal theorists who follow Michael Walzer’s use of the distinction between thick and thin to describe different moral arguments, which are described as exhibiting varying degrees of thickness/thinness (again this was a descriptive use): the more specific (thicker) arguments are distinguished from the more general (thinner) arguments.³²⁶ This distinction has been most notably adopted by legal theorists in their consideration of the role of morality in law.³²⁷ Their applications are also distinct from

³²³ Lawrence B. Solum, ‘Legal Theory Lexicon’ (2012) <<http://lsolum.typepad.com/legaltheory/2012/01/legal-theory-lexicon-fact-and-value.html>> accessed December 2012

³²⁴ R. A. Duff, ‘Law, Language and Community: Some Preconditions of Criminal Liability’ (1998) 18 *Oxford Journal of Legal Studies* 189, 200

³²⁵ These uses bear closest resemblance to Gilbert Ryle’s idea of thick descriptions (which contrast with thin descriptions) identified in: Gilbert Ryle, ‘The Thinking of Thoughts: What is ‘Le Penseur’ Doing?’ in *Collected Essays 1929-1968* (Routledge, 2009). These are just some examples of the vast literature chosen to demonstrate the breadth of their application in law: Robert Cooter, ‘Law and Unified Social Theory’ (1995) 22 (1) *Journal of Law & Society*, 50; Toni M. Massaro, ‘Gay Rights, Thick and Thin’ (1996) 49 *Stanford Law Review* 45; Adeno Addis, ‘The Thin State in Thick Globalism: Sovereignty in the Information Age’ (2004) 37 *Vanderbilt Journal of Transnational Law* 1; Matthias Kumm, ‘The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History’ (2005) 6 (2) *German Law Journal* 319; David Robertson, ‘Thick Constitutional Readings: when Classic Distinctions Are Irrelevant’ (2007) 35 *Georgia Journal of International & Comparative Law* 277; Michael T. Cahill ‘Attempt, Reckless Homicide, and the Design of Criminal Law’ (2007) 78 *University of Colorado Law Review* 879; Jorgen Moller and Svend-Erik Skaaning, ‘Systematizing Thick and Thin Conceptions of the Rule of Law’ (2012) 33 (2) *Justice System Journal* 136; Zoe Sinel, ‘Concerns about Corrective Justice’ (2013) 26 *Canadian Journal of Law & Jurisprudence* 137; Stephen Riley, ‘The Function of Dignity’ (2013) 5 (2) *Amsterdam Law Forum* 90

³²⁶ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994)

³²⁷ Again these are just some examples of the vast literature to demonstrate the breadth of their application in law: Renato Rosaldo, ‘While Making Other Plans’ (1985) 58 *Southern California Law Review* 19; Stephen Diamond, ‘Not-So-Critical Legal Studies’ (1985) 6 (4) *Cardozo Law Review* 693; Naomi Mezey, ‘Law as Culture’ (2001) 13 *Yale Journal of Law & Humanities* 35; Amy Bartholomew, ‘Human Rights and Post-Imperialism: arguing for a Deliberative Legitimation of Human Rights’ (2003) 9 *Buffalo Human Rights Law Review* 25; Yeludah Mirsky, ‘Human Rights, Democracy, and the Inescapability of Politics; or, Human Dignity Thick and Thin’ (2005) 38 *Israel Law Review* 358; Gunter Frankenberg, ‘Comparing Constitution: Ideas, Ideals, and Ideology – Toward a Lawyered Narrative’

the idea of thick and thin concepts (the articles listed do not reference thick or thin concepts), although in some instances the connection between ‘thick values’ and thick concepts is extremely close.³²⁸

My thesis supports the views of David Enoch and Kevin Toh, who observe:

We think that discussions of the nature of thick terms and concepts could help us in thinking about the nature of legal statements, and of law more generally, perhaps even pointing us towards some hitherto neglected theoretical avenues and options. And we also think - though we are not as confident - that reflecting about the example of legal concepts and statements can also serve to enrich the discussion of thick concepts more generally. The hypothesis that should be considered quite seriously, we believe, is that legal statements employ thick terms, and thereby express thick concepts, and that this feature of legal statements is responsible for their straddling the line between the descriptive and the normative.³²⁹

My thesis agrees with Enoch and Toh regarding the usefulness of the distinction between thick and thin concepts in enriching both our understanding of legal concepts (and legal judgments) and of the philosophical distinction between thick and thin concepts. My thesis extends the scope of this argument to include legal education - discussions of thick and thin concepts are relevant to the way we teach law because of the role these thick and thin concepts occupy within our legal system and legal practices - and argues that if we accept the existence and usefulness of thick and thin concepts within law (evidenced by their use in legal statements, legal decisions and legal theory) then legal education needs to reflect this by teaching future legal practitioners the conceptual skills required to engage with these concepts.³³⁰

(2006) 4 *International Journal Constitutional Law* 439; Megan Bradley, ‘Back to Basics: The Conditions of Just Refugee Returns’ (2008) 21 *Journal of Refugee Studies* 258; Shannon M. Roesler, ‘The Ethics of Global Justice Lawyering’ (2010) 13 *Yale Human Rights & Development Law Journal* 185; Graeme Laurie, ‘Recognizing the Right Not to Know: Conceptual, Professional, and Legal Implications’ (2014) 42 *Journal of Law Medicine & Ethics* 53; John Gillespie, ‘Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam’ (2014) 27 *Harvard Human Rights Journal* 107

³²⁸ Gregory Kaebenick discusses ‘descriptively rich concepts’ which he refers to as ‘thick values’ throughout his article, see: Gregory E. Kaebenick, ‘On genetic engineering and the idea of the sacred: a secular argument’ (2001) 13 *St. Thomas Law Review* 863. ‘Thick concepts’ are never mentioned but notable meta-ethicists John McDowell, David Wiggins and Philippa Foot are all referenced, which locates Kaebenick’s notion of thick values in close proximity to thick concepts; and Clifford Geertz is credited regarding thick description.

³²⁹ David Enoch and Kevin Toh, ‘Legal as a Thick Concept’ in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013), 258-259

³³⁰ This study is not located within philosophy of language (although there are some clear overlaps) therefore when I argue that we need to teach legal practitioners how to engage with thick and thin legal

This chapter and the next two are not a literature review (because they are not exhaustive) but this chapter and chapter seven does give the reader a fuller picture of the scope of the terms ‘thick’ and ‘thin’ as currently deployed in law. My thesis responds to the need for a compendium of thick and thin within law, therefore the extensive references to the wider literature and my footnotes are an important aspect of the substantive content of my thesis, they are not merely supplementary. This investigation does not offer a complete compendium of thick and thin within law, but one of the major strengths of my thesis is that it offers a much-needed collation of the more detailed yet disparate uses of thick and thin within law, it is through this collation that I have observed a number of issues concerning clarity. Whilst this investigation does not engage in a lengthy critique of the accuracy of the current legal deployment of thick and thin, I highlight some of the problems that seem to pervade the entire legal literature and note (within both the footnotes and main body of this chapter and the next) specific issues that indicate a lack of clarity within certain theorists use of the terms. Therefore it should be stated that despite these concerns over clarity my primary thesis aim and argument continues to advance the use and usefulness of thick and thin concepts within law. Any observation of inconsistency within the legal literature and suggestion that these terms need to be rendered sharper is advanced for the improvement of their future contribution to law, it only adds strength to my thesis, that despite weaknesses with their current deployment these terms can still usefully feature within law, and contribute to the jurisprudential debates addressed in the next chapter.

2 - Issues of clarity.

The legal literature on thick and thin concepts utilizes these terms with varying degrees of expertise and understanding. First, although they are not of central concern to my investigation (because their use of the term is substantively underdeveloped) it is worth mentioning that there are numerous articles that merely reference thick or thin in footnotes - these articles demonstrate the rising popularity and influence of thick and

concepts I realize that there could be a lengthy discussion regarding the nature of this engagement and what it would mean to be fully fledged thick legal concept users (I refer to this literature in chapter two), this study is not the appropriate arena for such a lengthy discussion.

thin concepts in law.³³¹ Out of those articles that refer to thick and thin concepts within the main body of the text varying degrees of importance is placed upon the distinction depending on the role it performs within the legal theorists central argument and secondary concerns, and therefore the terms ‘thick concept’ and ‘thin concept’ receive varying amounts of attention and explanation. Of these legal articles many use the term ‘thick concept’ without recognizing or discussing the complexity of the term.³³² The chief problem with these accounts is that there is no indication that there are multiple versions of the distinction between thick and thin and different kinds of content that can be picked out by the distinction. Instead it is presented as a universally accepted distinction, which is always applied in the same way picking out the same kinds of content (or at least implied through failure to at least mention otherwise).³³³

The difference between descriptive applications (thick and thin descriptions) and conceptual applications (thick and thin concepts) of the terms ‘thick’ and ‘thin’ are often confused. For example, Robert French AC refers to a definition of the rule of law, which ‘is sometimes called a “thick” concept of the rule of law.’³³⁴ It is unclear

³³¹ For some examples (this is not an exhaustive list), see: Perry Dane, ‘Vested Rights, Vestedness, and Choice of Law’ (1987) 96 *Yale Law Journal* 1191; Bradley W. Wendel, ‘Public Values and Professional Responsibility’ (1999) 75 *Notre Dame Law Review* 1; Bradley W. Wendel, ‘Value Pluralism in Legal Ethics’ (2000) 78 *Washington University Law Review* 113; Christopher A. Whytock, ‘Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy’ (2008) 41 *Loyola of Los Angeles Law Review* 629; Darryn Jensen, ‘Theories, Principles, Policies and Common Law Adjudication’ (2011) 36 *Australian Journal of Legal Philosophy* 34; Richard Nobles and David Schiff, ‘Disobedience to Law – Debbie Purdy’s Case’ (2010) 73 *Modern Law Review* 295; Lawrence B. Solum, ‘Pluralism and Modernity’ (1990) 66 *Chicago Kent Law Review* 93; Scott Brewer, ‘Scientific Expert Testimony and Intellectual Due Process’ (1998) 107 (6) *Yale Law Journal* 1535

³³² For example (again this is not an exhaustive list), see: Jay Connison, ‘The Pragmatics of Promise’ (1997) 10 *Canadian Journal of Law & Jurisprudence* 273. Jay Connison’s article is an article on conceptual analysis – the concept under consideration is PROMISE – that draws heavily from philosophy of language, so the majority of his references stem from this field as opposed to meta-ethics. He cites: Gilbert Harman, ‘Three Levels of Meaning’ (1968) 65 *Journal of Philosophy* 590; Steven C. Levinson, *Pragmatics* (Cambridge University Press, 1983); Hilary Putnam, ‘The Meaning of “Meaning”’ in *Philosophical Papers Volume 2: Mind Language and Reality* (Cambridge University Press, 1975); John Searle, *Expression and Meaning* (Cambridge University Press 1979)

³³³ For some examples see: Larry G. Simon, ‘The New Republicanism: Generosity of Spirit in Search of Something to Say’ (1988) 29 *William & Mary Law Review* 83; Jay Connison, ‘Assurance, Reliance, and Expectation’ (1998) 6 *Southern California Interdisciplinary Law Journal* 335; Mary Ann Glendon, ‘Foundations of Human Rights: The Unfinished Business’ (1999) 44 *American Journal of Jurisprudence* 1; Mike Redmayne, ‘Appeals to Reason’ (2002) 65 *Modern Law Review* 19; Mitchell N. Berman & Kevin Toh, ‘Pluralistic Nonoriginalism and the Combinability Problem’ (2013) 91 *Texas Law Review* 1739. Note that reference is made to the more in-depth discussion of thick legal concepts by one of the writers Kevin Toh in: David Enoch and Kevin Toh, ‘Legal as a Thick Concept’ in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013)

³³⁴ The Honourable Robert French AC, ‘Singapore Academy of Law Annual Lecture 2013 – “The Rule of Law as a Many Coloured Dream Coat”’ (2014) 26 *Singapore Academy of Law Journal* 1, 7; See also:

whether he is identifying the rule of law as a thick concept or referring to a thick conception of the rule of law (or maybe a thick description of the concept RULE OF LAW). In his conclusion he states:

there are different ideas of what the rule of law embodies. There are “thin” concepts and “thick” concepts. However, the features of lawfulness, rationality, consistency, fairness and good faith in the exercise of official powers, and the function of judicial review in determining the meaning and constitutionality of laws and the lawfulness of action under those laws, are essential elements of any constitutionally based concept of the rule of law.³³⁵

There are no references to any wider literature on thick and thin in this article, making it harder to deduce the intended meaning of the distinction as applied above, this is a common problem with articles that utilise the terms thick and thin without any reference to the philosophical literature regarding the development and nature of this conceptual distinction.³³⁶

This is a major problem for legal theory if the thick-thin distinction is expected to be beneficial and provide rewarding research, hence my thesis promotes the usefulness of the thick-thin distinction for law with the proviso that it needs to be better appreciated and understood by legal theorists.

Williams’ influence.

Much of the legal literature on thick and thin concepts uses Williams’ *Ethics and the Limits of Philosophy*³³⁷ as the starting point and operating definition of thick and thin ethical concepts (where this is not the case I explicitly state otherwise), although this literature often misunderstands Williams’ formulation of the distinction. As I demonstrated in chapter two and three Williams’ work needs to be understood as part of a wider body of meta-ethical literature regarding concepts that combine evaluation and description in some manner. The legal literature addressed in this chapter and

Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing Limited, 2008) which critiques the various conceptions of the thick-thin distinction.

³³⁵ *ibid* at 22

³³⁶ Thick and thin concepts are the primary focus of my investigation use of the terms ‘thick’ and ‘thin’ from this point forwards (unless stated otherwise) should be taken to mean conceptual thickness and thinness (to be referring to a distinction between different kinds of concepts and conceptual content).

³³⁷ Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge Classics, 2011)

chapter seven rarely demonstrates such an understanding or appreciation of the wider literature and as a result certain aspects of thick ethical concepts (especially Williams' account of them) are either inaccurately portrayed or missing from the legal discussion of thick and thin.³³⁸

As described in the last chapter, Williams' distinction between world-guided and action-guiding content is a central feature of his distinction between thick and thin concepts, and although this is recognized by most legal accounts (i.e. those legal accounts of thick and thin which reference Williams) the distinction is rarely analysed and does not receive the careful, critical attention that it receives within meta-ethics (see chapter four).³³⁹ There are three main aspects of Williams' work on thick concepts that are either missing entirely or insufficiently addressed by the legal literature: the distinction between a difference of degree and a difference of kind;³⁴⁰ the distinction between separationism or non-separationism (it is often unclear whether the legal theorists that operate with Williams' distinction attribute separationism or non-separationism to his account);³⁴¹ Williams' attack of prescriptivism.³⁴² Failure to

³³⁸ David Enoch, Kevin Toh and Heidi Li Feldman are notable exceptions to this, they reference the wider literature on thick ethical concepts and their development. Feldman goes further than this and highlights the overlaps between the literature in 20th century moral philosophy and legal philosophy arguing that many of the issues discussed by cognitivists and non-cognitivists were also discussed by philosophy of law albeit in their own terminology. It is for this reason that she finds it surprising that there is not more literature on thick and thin legal concepts. see note 329 and 321

Despite being brief Ronald Dworkin's succinct account of thick concepts is one of the more philosophically nuanced legal accounts. He is the only legal theorist to clearly recognize and explicitly state that Williams' account of thick and thin concepts was in direct contention with the prescriptivist account of such concepts as hybrids. Although Enoch and Toh offer by far the most detailed account of thick concepts, they do not explicitly recognize this aspect of Williams' work. Dworkin agrees with Williams that the prescriptivists are mistaken, stating that 'thick concepts cannot be dissected to reveal a base criterial concept.' Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 181 Dworkin (unlike other legal theorists) also recognizes the importance attributed to the distinction for its ability to mark important divisions within moral theory through analysis of the distinction between a difference of degree and kind, conceptual priority and evaluative flexibility. *ibid* at 182-183

³³⁹ Enoch and Toh utilize Williams' work as a starting point for their analysis of 'legal' as a thick term (and thick concept), but they do not address the extensive critical literature on these aspects of Williams' work. see note 329

Wang and Solum also utilize Williams' distinction between action-guiding and world-guided content in their analysis of REGICIDE but there are many inconsistencies in their formulation of thick and thin concepts that seem to be the result of misunderstanding Williams. See Solum and Wang note 324

³⁴⁰ Dworkin, Enoch and Toh are notable exceptions to this, they emphasize that the distinction between thick and thin concepts 'is not meant to be a categorical or bright-line one, but is instead one of degrees' and acknowledge that the characteristics of thick concepts are neither obvious nor settled. See note 329

³⁴¹ Dworkin, Enoch and Toh by arguing that the distinction is one of degree touch upon this matter, but only Enoch and Toh take this further and consider the arguments of separabilists, although they note that they have only touched the surface of these complex meta-ethical ideas. *ibid* at 267

³⁴² For example Wang and Solum utilize many of Williams' ideas in their account, but they advance a definition that has prescriptivist undertones: 'Thin ethical concepts are concepts that only have general and abstract evaluative or prescriptive content. Thick ethical concepts are ethical concepts that have both descriptive content and prescriptive content.' *ibid*

recognize these aspects of Williams' work combined whilst relying on Williams' work as the basis of the thick-thin conceptual distinction weakens the legal literature on thickness and thinness.

Many of the legal theorists noted in this chapter and addressed in more detail in chapter seven, fail to identify explicitly with Williams' terminology yet noted the importance of Williams' work for the distinction between thick and thin concepts. The lack of universality regarding choice of terminology is the root cause of a bigger problem within the legal literature (which also exists within the philosophical literature) – inconsistency – regarding the framing of the distinction (the nature of the content identified), which is often accompanied by an interchangeable use of the terms 'value', 'normative', 'evaluative' and 'prescriptive'. This interchangeability is particularly unhelpful, as it hides some of the subtle distinctions between competing accounts of thick concepts.

In *Ethics and the Limits of Philosophy*³⁴³ Williams was considering the difference between specific ethical concepts when he postulated his distinction. The meta-ethical discussion since then has continued to use the thick-thin distinction as a way of analysing the nature of specific concepts. This approach to the distinction between thick and thin concepts has yet to be fully developed within law, as at present certain legal concepts are cited as either thick or thin but there is only limited discussion of the reasons why and the implications of such construction.³⁴⁴ There are certain legal concepts that seem to feature more frequently under the attribution of thickness and thinness, such as those that embody fundamental principles that underpin our legal system. Consider for example HARM – one of the fundamental principles underpinning our legal system is that it is wrong to harm another individual.³⁴⁵ Criminal law is one area that has sought to codify and criminalise different types of harms and could provide multiple opportunities for a rich and diverse discussion of thick and thin concepts. Criminal offences such as MURDER, THEFT or ASSAULT are commonly cited as examples of thick concepts although the discussion is often limited to a brief

See note 338 above where I explain that Dworkin is a notable exception.

³⁴³ see note 337

³⁴⁴ David Enoch and Kevin Toh are a notable exception to this, see note 329

³⁴⁵ Anthony Duff's primary interest is in the criminalization of endangerment, thick ethical concepts are only briefly mentioned but in doing so Duff highlights the importance of thick ethical concepts in characterizing different kinds of harm see: R. A. Duff, 'Criminalizing Endangerment' (2005) 65 *Louisiana Law Review* 941 and R. A. Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 *Oxford Journal of Legal Studies* 189

footnote or mention that these are thick concepts.³⁴⁶ Another example is a RIGHT - fundamental to most legal and political systems because it represents minimum standards of treatment and is seen as offering protection for citizens within those systems - the philosophical literature on rights has received attention from thick and thin theorists.³⁴⁷

Criminal offences and the concepts of HARM and RIGHTS have been recognized as concepts that could be usefully elucidated by an analysis using the distinction between thick and thin to better grasp the metaphysical nature of these concepts. David Enoch and Kevin Toh³⁴⁸ offer a more detailed example (using the concept LEGAL VALIDITY) of this kind of potential application of the thick-thin distinction to legal conceptual analysis. Their work demonstrates the impact this kind of conceptual analysis can have for understanding the nature of law and key jurisprudential debates. Chapter six therefore utilises their discussion of LEGAL VALIDITY in a demonstration of the potential usefulness of thick and thin concepts for legal conceptual analysis, through an investigation of Hart's The Concept of Law. Enoch and Toh's work has been chosen not because this thesis supports their particular understanding and deployment of the distinction between thick and thin concepts, but because their account is one of the strongest applications of thick and thin within law, it is precise and lucid. It is not the intention of this study, neither is it necessary, to investigate and dictate the specific account of thick and thin concepts that should be adopted by legal theorists deploying these terms within law, my intention is to demonstrate how thick and thin have so far proved useful for legal theory (especially legal conceptual analysis) and why despite

³⁴⁶ For example James Penner draws on Williams' work and suggests that reliance on thick ethical concepts such as ASSAULT and MURDER is typical of English private law. The law exists in legal cases to the extent that specific cases trigger our knowledge about values (these values are represented by thick ethical concepts) and add to our knowledge of those values. J. E. Penner, 'Legal reasoning and the authority of law' in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003), 83. For a critique of Penner see: Darryn Jensen, 'The Problem of Classification in Private Law' (2007) 31 *Melbourne University Law Review* 516. I return to Penner's work later in this chapter.

³⁴⁷ For examples of discussions of thickness and thinness regarding rights see: Mary Ann Glendon, 'Foundations of human Rights: The Unfinished Business' (1999) 44 *American Journal of Jurisprudence* 1; Perry Dane, 'Vested Rights, Vestedness, and Choice of Law' (1987) 96 *Yale Law Journal* 1191; Yeludah Mirsky, 'Human Rights, Democracy, and the Inescapability of Politics; or, Human Dignity Thick and Thin' (2005) 38 *Israel Law Review* 358. For a discussion of thick and thin concepts regarding rights see: Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1992) Thomson utilizes the distinction between thick and thin concepts (it is only used in the introduction) to disprove the fact-value distinction and therefore also disprove the No-Reason Thesis. For a critique of Thomson see: Amy L. Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2013) 5 *Washington University Jurisprudence Review* 61. I return to both Thomson and Peikoff's work later in this section.

³⁴⁸ see note 329

the weaknesses in their current deployment their use should not be abandoned within law. Even if inconsistency is currently preventing these terms from achieving their full potential within law this distinction is relevant to and assists with the discussion of key jurisprudential debates as evidenced by the next chapter.

3 – The relevance of thick legal concepts for philosophers.

At the beginning of this chapter I noted that Enoch and Toh thought ‘that reflecting about the example of legal concepts and statements can also serve to enrich the discussion of thick concepts more generally’.³⁴⁹ Bernard Williams has advanced a similar claim. In *Afterword: What Has Philosophy to Learn from Tort Law?*³⁵⁰ Williams inverts traditional jurisprudence and considers whether it is philosophy that could learn something new from legal practices, which could enrich philosophers’ understanding of concepts (especially those that are central to our ethical and political practices). Heidi Li Feldman agrees with Williams and summarises the point as follows:

Common-law reasoning adjudicates disputes via concepts and distinctions (e.g., liability, causation) rooted in ordinary experience (e.g., fault, responsibility) but embedded in a body of legal precedent (e.g., the common law of torts) that continuously and self-consciously refines and reworks these concepts and distinctions in order to better resolve current disputes. The pressure exerted by this process on the development of these concepts and distinctions reveals information about them that is relevant to their non-legal counterparts, but which would not emerge during the course of ordinary usage because ordinary usage neither demands nor involves the same sort of intense attention required by common-law development.³⁵¹

There are two potential objections to this, both regarding the relationship between legal concepts and non-legal concepts. The first argues that the concepts and distinctions driving legal arguments are neither commonsensical or distinctively legal, but are instead derived from other domains e.g. economics. It is therefore argued that the legal concepts do no real work in legal argument and do not come under any pressure; so

³⁴⁹ *ibid* at 258-259

³⁵⁰ Bernard Williams, ‘Afterword What Has Philosophy to Learn from Tort Law?’ in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995)

³⁵¹ Heidi Li Feldman, ‘Blending Fields: Tort Law, Philosophy and Legal Theory’ (1998) 49 *South Carolina Law Review* 167, 168

they cannot be the subject of philosophers' attention. Williams responds in the spirit of J. L. Mackie and observes that the relevant legal concepts 'must have some force even to serve as rationalizations.'³⁵² Whatever 'really' drives legal argument, these legal concepts must have some force in their own right because their use by legal practitioners within legal practice is evidence of this.

The second objection accepts that the concepts and distinctions driving legal argument are legal and are therefore under pressure; but denies that there is a connection between these legal concepts and non-legal concepts. Both Williams and Feldman find this line of reasoning implausible.³⁵³ There may be differences between legal and non-legal concepts, but they are still sufficiently related that philosophy could learn something from legal concepts (the role of lay people in the legal system is evidence of this e.g. jurors). There are differences between the legal use of concepts and the ordinary use of non-legal concepts, but once these are acknowledged legal reasoning can still be instructive for philosophy. For example, legal cases require a resolution (a final decision) so legal concepts can sometimes seem forced in ways that ordinary use of non-legal concepts does not require, for these non-legal concepts can be left fuzzy.³⁵⁴ An appreciation of the goals and principles that drive a particular area of the law will therefore be necessary to understand the forces that operate on legal concepts.³⁵⁵

Both Williams and Feldman claim that these two objections can be refuted, but argue over the contestability of the concepts that both are suggesting could be informative for philosophers. Williams writes: 'It would be very surprising if philosophy could learn only from the less controversial parts of legal argument and doctrine, and it is itself significant that some concepts constantly cause trouble in the law and provide a focus for reinterpretation and controversy.'³⁵⁶ Feldman argues that to a certain extent

³⁵² see note 350 at 489

Mackie denied that ethical properties were actual properties of the world, but argued that this ontological claim should not cause us to alter our moral practices or refrain from making ethical judgments; he maintained that ethics and morality do and should guide human action. See: J. L. Mackie, *Ethics: Inventing Right and Wrong* (Penguin, 1977)

³⁵³ see note 350 at 490 and note 351 at 169

³⁵⁴ Consider the example from criminal law of an assailant pulling the trigger of a gun in one jurisdiction and the bullet hitting the victim who is in another jurisdiction, common sense may be satisfied with such an explanation, but the law will need a final decision regarding where the victim was killed to decide where to prosecute.

³⁵⁵ Williams uses the example of tort law again and argues: 'Philosophy, then, will not only have to attend to the principles and goals of tort law; it will also have to understand at a theoretical level why it has those principles and goals.' see note 351 at 492

³⁵⁶ *ibid* at 494

Williams is right, but that these concepts are not always controversial. She argues that the central legal concepts (thick legal concepts) that are often at the centre of debates in appellate cases are the same concepts that also often cleanly resolve cases without any disagreement. Their minor disagreement regarding which particular concepts could be informative for philosophers, does not subtract from their unanimous claim that legal conceptual practices could be useful for philosophers in understanding the nature of concepts. This is further evidence of the importance of my investigation for both law and philosophy, and demonstrates that my thesis (that thick and thin concepts are useful within law) may also have relevance outside law for analytic philosophy itself.

Thick legal concepts (and to a lesser extent thin legal concepts) are important to common law reasoning because they help navigate between the way the world is (world-guided content) and our responses to this (they guide our actions and judgments). Williams notes a thorough and careful study of case law could also be revealing for philosophy regarding the nature and workings of thick concepts. Feldman agrees: ‘common-law cases illustrate the full panoply of how thick concepts function and develop. Often thick legal concepts operate smoothly, settling issues and outcomes. In other cases, however, precisely the same concepts become problematic.’³⁵⁷ Even those thick legal concepts that don’t seem to have any obvious non-legal counterparts could still be revealing. Feldman suggests: ‘philosophy could benefit from a detailed analysis of how judges and lawyers, apply, deploy, manipulate, exploit, and engineer thick legal concepts. Such an analysis could yield general insights into the workings of thick concepts throughout the various domains in which they operate.’³⁵⁸ The limits of the present research do not allow such a detailed and ambitious research project to be entered into here, but the brief discussion of LEGALITY (see next chapter) demonstrates how such a project could begin; and chapter seven addresses the deployment of thick concepts within the common law by the judiciary.

Williams concludes that philosophy can learn from both the successful and unsuccessful applications of concepts in law:

It is not just the success of our concepts under the extreme conditions of the law that has something to tell philosophy, but also their occasional failure to survive that exposure. Philosophy will be able to

³⁵⁷ See note 351 at 181, Feldman uses the example of Palsgraf to demonstrate her point.

³⁵⁸ *ibid* at 185

learn the right lessons, however, only if there is an adequate theory (in part provided by political philosophy itself) about what features of the concepts, and what special features of the law, have contributed to those success and failures.³⁵⁹

The problems that arise when legal concepts are unsuccessfully applied in law are not evidence that conceptual analysis in law should be abandoned as some legal theorists have suggested (as noted earlier, in chapter two); and neither do the problems encountered by the legal application of the distinction between thick and thin concepts provide such evidence (as demonstrated by my thesis). Moreover, legal conceptual analysis is only one of the three aspects of law that can be illuminated by the thick-thin distinction.

4 – Conclusion.

This chapter has introduced the legal literature on thick and thin and began to collate the various disparate legal uses of thick and thin, which when combined with the literature referenced throughout the following three chapters provides a picture of their current use and supports my argument for their usefulness within law. This chapter has been fairly descriptive, which has been necessary to achieve this extensive (albeit incomplete) compendium of thick and thin within law, the following three chapters move away from description and towards analysis, to support my thesis that thick and thin concepts are useful within law. The following chapter addressed the usefulness of thick and thin concepts for legal conceptual analysis and draws upon Enoch and Toh's argument that construing 'legal' thickly can have important implications for our understanding of the nature of law and therefore legal theories such as H. L. A. Hart's legal positivism.³⁶⁰ The next chapter by drawing analogies between the philosophical literature on thick and thin and Hart's legal positivism demonstrates the potential of thick and thin concepts for enriching our understanding of the nature of law and therefore legal theory.

³⁵⁹ see note 350 at 497-498

³⁶⁰ H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd edition, 1994)

Chapter Six: Thickness, Thinness and *The Concept of Law*

1- Introduction.

*The Concept of Law*³⁶¹ has raised issues that have occupied philosophers since its first publication in 1961.³⁶² Hart's legal positivism remains one of the most important legal theories to date and is crucial to the legal positivist tradition.³⁶³ Hart's legal positivism marked the beginning of a significant shift (within legal positivism) towards an increasingly influential new view of the social sciences. Previously the social sciences had tried to match the scientific approach used in the 'hard sciences'.³⁶⁴ In contrast, the new approach emphasised both the actions within a social practice and the *meaning* those actions have for the participants of the practice.³⁶⁵ Hart's interchanges with Lon

³⁶¹ H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd edition, 1994)

³⁶² The literature generated by *The Concept of Law* is vast but I wish to draw attention to the following useful texts: Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001); Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004); Neil MacCormick, *H. L. A. Hart* (Stanford University Press, 2nd edition, 2008); Michael Bayles, *Hart's Legal Philosophy: An Examination* (Kluwer Academic Publishers, 1992); P. M. S. Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays In Honour of H. L. A. Hart* (Clarendon Press, 1977); and John Mikhail, 'Plucking the Mask of Mystery from Its Face: Jurisprudence and H. L. A. Hart' (2007) 95 *Georgetown Law Journal* 733

³⁶³ There are a variety of legal positivist theories advocated, Bix describes legal positivism as 'based on the simple assertion that the proper description of law is a worthy objective, and a task that needs to be kept separate from moral judgment (regarding the value of the present law, and regarding how the law should be developed or changed).' Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition, 2012), 33

For further reading on legal positivism (this list is not exhaustive), see: Tom D. Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, 1996); John Gardner, 'Legal Positivism: 5 ½ myths' (2001) 46 *American Journal of Jurisprudence* 199; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007), v; Brian Bix, 'Legal Positivism' in W. A. Edmundson and M. P. Golding (eds), *Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell, 2005), 29-49; Jules Coleman and Brian Leiter, 'Legal Positivism' in D. Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (Blackwell, 2nd edition, 2010), 228-248; Julie Dickson, 'Legal Positivism: Contemporary Debates' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2012), 28-64; Robert P. George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, 1996); Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford University Press, 1999); David Lyons, *Moral Aspects of Legal Theory* (Cambridge University Press, 1993); Andrei Marmor, 'Legal Positivism: Still descriptively and Morally Neutral' (2006) 26 *Oxford Journal of Legal Studies* 683; Joseph Raz, *The Authority of Law* (Clarendon Press, 1979); Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, 1994); Scott Shapiro, *Legality* (Harvard University Press, 2011)

³⁶⁴ The attempt to mirror the empirical methods of the 'hard sciences' (e.g. physics and chemistry) was exemplified in the rise of 'formalism' in legal education, influenced by Harvard Law School Dean Christopher Columbus Langdell. See: Anthony T. Kronman, *The Lost Lawyer* (Harvard University Press, 1993)

³⁶⁵ Max Weber's work is the foundational work on hermeneutic approaches to social theory, see: Max Weber, *Economy and Society*, (Bedminster Press, 1968); and Max Weber, "'Objectivity" in Social Science and Social Policy' in *The Methodology of the Social Sciences* (Free Press, 1949), 50-112. Hart's immediate influence was Peter Winch (another important scholar on hermeneutic approaches), see: Peter Winch, *The Idea of Social Science* (Routledge, 1958)

Fuller,³⁶⁶ Patrick Devlin (Lord)³⁶⁷ and Ronald Dworkin³⁶⁸ shaped twentieth century legal theory. An important figure in Ordinary Language Philosophy, and clearly influenced by Wittgenstein's work on language games, Hart famously applied to general jurisprudence J L Austin's method of 'using a sharpened awareness of words to sharpen our perception of the phenomena.'³⁶⁹ For present purposes his method was applied to two problems in law, which can be summed under the topic heads the 'language and normativity of law' and 'the semantic sting' (referencing Dworkin's famous criticism of Hart).

Ronald Dworkin is routinely seen as Hart's chief opponent, and indeed Hart dedicates most of what is now the postscript to the second edition of his book to replying to Dworkin's criticism.³⁷⁰ Dworkin opposed Hart's theory of law on the basis that Hart's approach to legal philosophy is undermined/'stung' by Hart's own approach to words – that is, he wrongly thought 'that lawyers all follow certain linguistic criteria for judging propositions of law.'³⁷¹ The extent to which Hart and Dworkin disagree or are engaged in different enterprises (Hart's concern is to describe law, whereas Dworkin's concern is to normatively justify law) is a controversial issue.³⁷² Hart's legal positivism led, amongst other things, to a resurgence of natural law, in which contemporary natural lawyers such as J. M. Finnis responded to and challenged the metaphysical premises of *The Concept of Law*.³⁷³ Significantly, useful analogies can

³⁶⁶ H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) *Harvard Law Review* 593 and Lon. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 (4) *Harvard Law Review* 630

³⁶⁷ Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1968). Hart replied in a series of lectures (the Harry Camp Lectures) at Stanford University entitled 'Law, Liberty and Morality' later published as H. L. A. Hart, *Law, Liberty and Morality* (Stanford University Press, 1963).

³⁶⁸ Dworkin's fullest statement of Hart's legal positivism is found in Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986)

³⁶⁹ see note 361 at 14

³⁷⁰ Both Hart and Dworkin adopt a hermeneutic approach to law, but Dworkin argues that a hermeneutic theory of law should adopt the position of a participant within the practice and offer an interpretation of the practice in its best light (morally advantageous). See note 395 at 45-113. Hart disagrees and advances a descriptive theory of the practice as opposed to participation in the practice. See: H. L. A. Hart, 'Introduction' and 'The Postscript' in *The Concept of Law* (Oxford University Press, 2nd edition, 1994); and H. L. A. Hart, 'Comment' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (Clarendon Press, 1987)

³⁷¹ *ibid* Dworkin at 45

³⁷² Scott Shapiro, 'The Hart-Dworkin debate: a guide for the perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press, 2007)

³⁷³ John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980). Finnis also proffered a hermeneutic approach to law (that differed to both Dworkin's and Hart's) that argued that a hermeneutic theory should adopt the perspective of a (hypothetically) practically reasonable person, who uses appropriate moral reasoning to reach conclusions about the binding nature of moral obligations created by the legal system. Hart disagreed with Finnis (and Dworkin). Bix construes Hart's approach to hermeneutic theory as a theory that simultaneously: '(1) attempts to take into account the participant's

be drawn between Williams' treatment of thick and thin ethical concepts in *Ethics and the Limits of Philosophy* (ELP)³⁷⁴ and Hart's legal positivism that illuminate many of the distinctions Hart was working with (and later theorists were responding to). The topics so illuminated include Hart's famous attention to internal and external perspectives, the distinction between law and morality, and the distinction between primary and secondary rules (including the Rule of Recognition).³⁷⁵

Chapter aims.

The previous chapter introduced the topic of thick and thin within law and began my argument in support of my thesis that thick and thin concepts are useful within law. I argued that thick and thin concepts (and terms) can be found within legal statements and legal judgments; further to this they can enrich our understanding of these legal concepts, legal statements and legal judgments (Enoch and Toh's work on LEGALITY was used as an exemplar). This chapter continues to develop my thesis by arguing that thick and thin concepts can enrich our understanding of specific legal theories – in which Hart's legal positivism, due to its seminal importance within legal theory, is my test subject – although the discussion will be based on a supposition that the usefulness of thick and thin concepts extends beyond Hart's legal positivism because the jurisprudential issues addressed by Hart (and this chapter) are central jurisprudential issues that arguably any theory of law needs to address.³⁷⁶

perspective, and (2) manages to choose among possible participants' perspectives without having to make moral judgments, while (3) keeping sufficient distance from the participants' perspective to allow for moral criticism of the whole system/enterprise.' Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition, 2012), 44. Roger Shiner argued that as legal positivism inevitably develops, it becomes more sophisticated and closer to natural law theory, as it responds to critique (he also argued the reverse of this – that natural law develops in the direction of legal positivism). Roger Shiner, *Norms and Nature* (Clarendon Press, 1992). In a review, Frederick Schauer agreed with Shiner's basic analysis, but disagreed with the direction that Shiner saw 'sophisticated legal positivism' travelling on the basis that it was in danger of sliding into natural law theory. For his review see: Frederick Schauer, 'Critical Notice' (1994) 24 *Canadian Journal of Philosophy* 495. For Schauer's proposed alternative approach see: Frederick Schauer, 'Positivism Through Thick and Thin' in Brian Bix (ed), *Analyzing Law* (Clarendon Press, 1988).

³⁷⁴ Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge Classics, 2011).

³⁷⁵ Hart's distinction between the internal and external perspective is sometimes referred to as a hermeneutic approach to social science. The hermeneutic approach (Hart's emphasis on the internal aspect of legal rules) is in tension with those who want social theory to be more scientific, because it prioritises the participants in the social practice and their understanding. See: Brian Bix, 'H. L. A. Hart and the Hermeneutic Turn in Legal Theory' (1999) 52 *Southern Methodist University Law Review* 167; and Thomas Morawetz, 'Law as Experience: Theory and the Internal Aspect of Law' (1999) 52 *Southern Methodist Law Review* 27.

³⁷⁶ Some of these jurisprudential issues will arise again in the next chapter where I consider the wider jurisprudential implications of thick and thin.

Williams' formulation continues to inform and lead the legal discussion of thick and thin concepts and at no point in this chapter are criteria established for identifying and distinguishing between thick and thin concepts, or as an argument in favour of a particular account of the thick-thin distinction. My aim continues to be a demonstration of the use and usefulness of thick and thin concepts within law (now using Hart's *The Concept of Law*³⁷⁷ as an exemplar). Reference to Enoch and Toh's thick construction of LEGAL³⁷⁸ will be made as their analysis supports my argument for the usefulness of thick and thin concepts within legal conceptual analysis and Hart's positivism featured in their discussion of thick and thin concepts within law.³⁷⁹

The following discussion of Hart's work focuses primarily on his distinction between the internal and external perspective because of the close comparisons that can be made there with the meta-ethical discussion of evaluative standpoint discussed by Williams and other thick and thin theorists, but also because the matter occupies a central position within Hart's theory, underpinning Hart's many other important ideas such as his three key theses: the Social Thesis, the Separability Thesis and the Limits of the Law Thesis.³⁸⁰ The importance attached to the internal perspective by hermeneutic theories (such as Hart's) raises problems for critique in social science, specifically how to justify evaluating the descriptions of cultures or social practices.³⁸¹ It also raises problems for a notion of 'evidence' that is already controversial within social science. The internal point of view will have a role in both the evaluations made of the evidence gathered, and in the gathering of the data.³⁸² This chapter will therefore also have wider implications that extend to descriptive theories in social science, although this is not my primary aim in this chapter.³⁸³

³⁷⁷ see note 361

³⁷⁸ David Enoch and Kevin Toh, 'Legal as a Thick Concept' in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013)

³⁷⁹ *ibid*

³⁸⁰ I have limited my discussion of Hart in this way because it would be far too ambitious to try to cover all aspects of *The Concept of Law*, and would detract from this investigation and my thesis.

³⁸¹ Charles Taylor notes an ongoing debate regarding whether an attempt to 'explain each culture or society in its own terms... rules out an account which shows them up as wrong, confused, or deluded.' Charles Taylor, *Philosophy and the Human Sciences* (Cambridge University Press, 1985), 123. Taylor argues that it is possible to adopt an 'interpretive' approach and retain the ability to critique the culture/practice that is being explained.

³⁸² H. Hamner Hill, 'H. L. A. Hart's Hermeneutic Positivism: On Some Methodological Difficulties in The Concept of Law' (1990) 3 *Canadian Journal of Law & Jurisprudence* 113, 123-125

³⁸³ For a more detailed discussion of the problems associated with description in social sciences (including law), see: Brian Bix, 'On Description and Legal Reasoning' in L. R. Meyer (ed), *Rules and Reasoning* (Hart Publishing, 1999), 7-28

2 - Internalism vs Externalism.

The distinction between internalism and externalism plays a key role in *The Concept of Law*³⁸⁴ and parallels Williams' emphasis on evaluative standpoint in *Ethics and the Limits of Philosophy*.³⁸⁵ Hart's distinction between an internal and external perspective to the practice had important implications for the social sciences in general, not just for law.³⁸⁶ According to Hart, to understand 'any form of normative social structure, the methodology of the empirical sciences is useless; what is needed is a 'hermeneutic' method which involves portraying rule-governed behaviour as it appears to its participants.'³⁸⁷ This idea raised an important question: How can we engage in the scientific activity of picking out and understanding what is going on amongst other peoples, when it appears that we could always be making some catastrophic mistake in which the meanings brought by participants to a practice are badly misinterpreted?³⁸⁸

Hart is concerned with the social phenomenon of law, and focuses on the notion of a habit of obedience. He notices that if you only occupy the position of an external outsider viewing the practice you cannot adequately account for, recognize, or describe the social phenomenon in play.³⁸⁹ For example, Hart shows that you cannot identify a

³⁸⁴ see note 361

³⁸⁵ see note 374

³⁸⁶ see note 361 at 50-78. The classification of law as a member of either the social sciences or humanities is a contentious issue, this is evidenced at the university level through differences in the location of the law faculty, for example at the University of Kent the Law School is located within the Social Sciences. For the purposes of this study I operate on the basis that law is a social science, even though the philosophical context I am advocating for law is borrowed from the humanities. For an interesting introduction to the philosophy of social science and the particular problems presented by this field of enquiry see: Alexander Rosenberg, *Philosophy of Social Science* (Westview Press, 4th edition, 2012)

³⁸⁷ H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1984), 13

³⁸⁸ This problem is not specific to law or philosophy, it is underpinned by fundamental methodological questions that philosophy has tried to answer since the beginning of classical philosophy in Ancient Greece; this has manifested into a methodological divide within social sciences between naturalism and interpretation. See: Alexander Rosenberg, 'The Methodological Divide: Naturalism versus Interpretation' in *Philosophy of Social Science* (Westview Press, 4th edition, 2012), 11-35

³⁸⁹ In chapters two and three I addressed the meta-ethical discussion of the external standpoint and these ideas will also be relevant to this chapter. McDowell's External Standpoint Experiment challenged the non-cognitivist's claim that the evaluative and descriptive aspects of an evaluative concept can always be disentangled. The debate between cognitivists and non-cognitivists concerned the possibility of mastering a concept independently of the evaluative standpoint (shared by the community). The non-cognitivist argues that an outsider (someone external to the practice) could master the extension of the

sovereign, just by looking at behaviour as viewed from the point of view of the external observer. He makes it clear that his point applies much more generally and has wide impact.³⁹⁰ It is of particular relevance to anthropology, for the anthropologist trying as a social scientist to understand a tribe will occupy the position of an external observer and never truly understand the tribe, yet if he assimilates himself into the tribe and becomes internal to the practice he will now be able to understand the tribe, but this account will no longer be an objective external social scientific account of their practices.³⁹¹

Hart argues that those external to the legal practice cannot adequately account for, recognize or describe the social phenomena of law, because you need to understand the internal aspect of the practice that is captured by the evaluative standpoint of the relevant community. Internal legal judgments are those made from the point of view of legal officials and others similarly committed to the laws of their legal system, containing an element of endorsement that is not present in external legal judgments.³⁹² External legal judgments are those made by observers external to the legal systems that are the objects of their study, they recognize acts of the particular legal system under observation as legal or illegal without endorsing or criticizing them. Despite critical attack this distinction still seems to capture something important in the relevant phenomenology, something that is also captured by the literature on thickness and thinness.³⁹³

concept in the same way an insider (someone internal to the practice) could, because disentangling was possible.

³⁹⁰ see note 361 at 55-57

³⁹¹ The anthropologist Clifford Geertz shared many of the same philosophical influences as Williams and Hart, being largely influenced by Gilbert Ryle and Ludwig Wittgenstein. He drew from the ordinary language aspects of both philosophers, adopting the proposition of thick description from Gilbert Ryle and importing into anthropology the concept of family resemblance from Wittgenstein. It is unsurprising then that there are many parallels between Hart's distinction between internal and external perspectives and the work of anthropologists such as Geertz. See: Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973) and Clifford Geertz, *Local Knowledge: Further Essays In Interpretive Anthropology* (Basic Books, 1985)

³⁹² Kevin Toh offers a discussion of Hart as an expressivist, at least with regards to this aspect of his account (endorsement). See: Kevin Toh, 'Hart's Expressivism and his Benthamite Project' (2005) 11 (2) *Legal Theory* 75

³⁹³ Joseph Raz, 'The Purity of the pure Theory' (1981) 35 *Revue Internationale de Philosophie* 411 and Gerald Postema, 'Co-ordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 165

Joseph Raz's legal positivism suggests a middle ground between external points of view and fully committed internal points of view, these are called 'statements from a point of view' or 'detached normative statements;' these statements accept a particular normative position is necessary in making a particular claim, but maintain that this does not also require endorsement of the particular normative position. Joseph Raz, *The Authority of Law* (Clarendon Press, 1979), 153-157. According to Raz '[l]egal scholars – and this includes ordinary practicing lawyers – can use normative language when

Thus we can recall that evaluative standpoint is an important feature of Williams' account of thick and thin concepts, Williams asserting a claim similar to Hart's regarding ethical concepts; that is, you need to understand the evaluative standpoint of an ethical community (Williams refers to this as a 'social world') to be able to apply their ethical concepts.³⁹⁴ Williams' discussion of evaluative standpoint acknowledges the difference between an internal member of the practice and an external observer, and Williams (like Hart) recognises that the evaluations associated with a particular practice will be understood differently by those internal to the practice in comparison to those external to the practice. This has important implications for our conceptual competence (our ability to understand both our own concepts and the concepts of others, especially those from other practices). The meta-ethical literature on thick and thin concepts (in particular Williams' work) offers a new way of addressing these matters pertaining to conceptual competence (the different levels of conceptual competence attributed to insiders and outsiders).

Conceptual competence.

In chapter two of my thesis I discussed the idea of grasping the meaning of a concept, as clarifying this is important to both the meta-ethical literature and legal literature in many ways, for example in helping to explicate ethical disagreement and legal disagreement. The question is: to what extent do we need to grasp the meaning of a concept and endorse this meaning to be able to successfully apply the concept? There seems to be a distinction between having a concept within one's repertoire and being a fully-fledged concept user who understands and endorses the meaning of the concept.³⁹⁵ Williams discusses this question through the idea of a fully-fledged thick concept user, who he requires to share the evaluative standpoint of the social community. The thick concept user if external to the practice may be able to apply the thick concept appropriately in some instances, through luck or detailed study of the

describing the law and make legal statements without thereby endorsing the law's moral authority.' *ibid* at 156

³⁹⁴ As I demonstrated in chapter four this aspect of Williams' account has been the subject of critical scrutiny, this chapter does not engage with these criticisms but I accept that a more detailed examination of the parallels between Williams and Hart, and of the role of thick concepts within *The Concept of Law* would need to address these criticisms.

³⁹⁵ As can be seen from the extensive literature addressed in chapters two and three this is a contentious issue and I focus purely on Williams' contributions to the issue, as it is his work that I argue is informative for law.

usual applications; yet whilst in certain instances he may demonstrate thick concept competence he would still not be classed as a fully-fledged thick concept user, because his external status denies him the possibility of sharing the evaluative standpoint associated with the social community's thick concepts. Williams distinguishes between the outsider's limited conceptual competence and the insider's fully fledged thick concept use on the grounds that, if we are to be confident in our conceptual practices then we need more than merely limited conceptual competence, but require something closer to concept mastery, however long this may take to achieve.

Hart's emphasis on the internal dimension of legal practice places the external observer of a legal system at a disadvantage in terms of his ability to demonstrate concept mastery; he does not share the evaluative standpoint of those internal to the practice and his conceptual competence is limited by this (it could also be limited by other factors, just as the internal participants conceptual competence is not solely linked to their understanding of the evaluative standpoint, there are other factors at work here too). With detailed observation and study he maybe able to identify some legal phenomena that insiders to the practice would refer to as the rule of recognition and the sources thesis³⁹⁶, but he may not be able to identify successfully what counts as a vehicle for the purposes of the Road Traffic Act.³⁹⁷ It is this subtle difference in conceptual competence that is the difference between full and partial understanding of a concept (also referred to as concept mastery or complete conceptual competence).

There are various interpretations of Hart's distinction between the internal and external perspective, all of which can be enriched by the meta-ethical literature on thick concepts (such as Williams *Ethics and the Limits of Philosophy*).³⁹⁸ Enoch and Toh disagree about the accuracy of the distinction between internal and external as construed by Hart, but both agree 'we can take lessons from the phenomenon of thick concepts.'

Example – the thick term LEGAL.

³⁹⁶ It is not necessary for an internal participant in a legal system to understand the term 'rule of recognition' to be able to operate with it, their identification of legal rules is evidence that they possess knowledge of the rule of recognition (even if this is subconscious).

³⁹⁷ This example is used because Raz's discussion of Hart's ideas uses the case of *Garner v Burr* (1951) 1 KB 31 and the example of how to understand the term vehicle in such a case.

³⁹⁸ see note 378 at 269

Enoch and Toh argue that analogous explanations can be drawn from the above discussion that are relevant to the thick term LEGAL:

We suggest, then, that “legal” be thought of as a thick term, and the concept legal as a thick concept. The concept’s descriptive content can then be understood in terms of representations of some social facts – i.e. the social facts in virtue of which some act or practice type counts as legal or illegal. These facts would differ from one jurisdiction to the next, but they may be uniform across jurisdictions on sufficiently high levels of abstraction. But as with other thick concepts, that it has descriptive content does not preclude its being evaluative as well. Indeed, often, or perhaps even necessarily, declaring an act legal (or illegal) would involve an expression of some evaluative or normative commitment. There may be an underlying normative judgment involved here – perhaps something to the effect that the fact that an act satisfies the descriptive criteria for legality is a reason for certain officials to permit them, or perhaps to the effect that the fact that an act fails to satisfy these descriptive criteria counts strongly against these officials permitting it.³⁹⁹

The above analogy of legal as a thick concept distinguishes between two kinds of conceptual content: descriptive and normative content. The descriptive content of ‘legal’ if perceived as a thick concept can be very easily accommodated; indeed, this is hardly surprising because the descriptive features of law have received less critical attention than its normative features.⁴⁰⁰ The relation between an act being legal and satisfying the descriptive criteria for legal would be similar to the example of courageous; the relation between an act being courageous and it being an example of overcoming fear.⁴⁰¹ Construing a legal concept thickly does not place any additional requirements on the descriptive content, but it does on the normative content, so it is upon this aspect that attention is focused.

³⁹⁹ *ibid* at 264-265

⁴⁰⁰ The nature of these descriptive aspects has been widely debated, but even those theorists who promote the normative aspects of law over the descriptive aspects do not deny the existence of descriptive elements. For example, in the traditional debate between legal positivists and natural lawyers neither party denied the role of such descriptive content in legal concepts, statements and judgments; it was the relationship between the descriptive and normative content that was under contention (and to a certain extent the existence of normative legal content was questioned).

⁴⁰¹ When discussing (earlier in the article) the evaluative or normative commitment that underlies a thick concept they provide the example of COURAGE: ‘Thus, paradigmatic, literal uses of the word “courageous” (e.g. “it was courageous of her to stand up to her boss in that way”) in some way commit the speaker not just to the relevant descriptive content (“Standing up to her boss in that way involved overcoming some fear”), and not just to an addition of some evaluative “colouring” (“and hurray for that!”), but also to some more general evaluative judgments – in this case, perhaps something like that overcoming fear is often the thing to do, or that many acts that involve overcoming fear are the better for it.’ *ibid* at 260

The accommodation of the more normative features seems problematic in many ways (some are specific to the legal application and others are generated by a discussion of thick concepts in any arena). I begin with those that are associated with thick concepts (in general) and continue to operate with Enoch and Toh's characterization: 'The uses of words or terms expressing thick concepts, or *thick terms* – at least their paradigmatic, literal uses – in some way involve a commitment to an underlying normative or evaluative judgment.'⁴⁰² The evaluative judgment is more than an evaluative colouring.⁴⁰³ It is closer to a general evaluative judgment such as 'overcoming fear is often the thing to do.'⁴⁰⁴ The commitment to the underlying normative or evaluative judgment is present in both non-assertoric uses and negative statements involving the thick concept.⁴⁰⁵ Whilst it might be accepted that thick concepts convey some evaluative or normative content (such as the underlying normative or evaluative judgment) the location of this evaluation is widely disputed (how the evaluation is conveyed by the thick concept). The dispute is mainly between two ways of viewing the matter – as a semantic matter or a pragmatic matter – and goes directly to the question: to what extent is the evaluative content a part of the meaning of the concept?

If a semantic account is adopted the evaluative content is part of the very meaning of the concept: 'furthermore, if evaluation is a matter of the semantics of thick terms, then if the evaluative thought conveyed is false, so is the relevant judgment as a whole.'⁴⁰⁶ The evaluative and descriptive aspects of a thick concept under the semantic account are both a part of the meaning of the concept and operate symmetrically as partners in

⁴⁰² *ibid*

⁴⁰³ The kind of evaluation Enoch and Toh seem to have in mind here is similar to that asserted by the emotivist, as they suggest such evaluative colouring would be akin to "And hurray for that!" *ibid* at 46

⁴⁰⁴ *ibid*

Enoch and Toh emphasise that by characterizing the evaluation as an underlying normative judgment they are not attributing universal status to it, there may be exceptions or variations. They reference the following metaethical literature. Jonathon Dancy, *Ethics without Principles* (Oxford University Press, 2004) who discusses ethical particularism - for a critique of ethical particularism see: Sean McKeever and Michael Ridge, *Principled Ethics: Generalism as a Regulative Ideal* (Oxford University Press, 2006) - and Mark Schroeder, 'A Matter of Principle' (2009) 43 (3) *Nous* 568. Pekka Vayrynen, 'Thick Concepts and Variability' (2011) 11 (1) *Philosophers Imprint* 1 discusses the possibility of evaluative/normative variability of thick concepts across various contexts and the implications of construing evaluative/normative content flexibly.

⁴⁰⁵ In non-assertoric uses of thick terms it is not commitment to the underlying normative judgments content that is in dispute, it is the appropriateness of the judgment in the particular instance that is disputed. When a thick concept is negatively applied in some manner it is possible to object to this use – the *not-one-of-my-words* response – whilst still endorsing the underlying normative judgment of the thick concept.

⁴⁰⁶ see note 378 at 261

constituting the concept. The pragmatic account argues that the evaluation is not entailed (it is not part of the meaning) but is *conversationally implicated* or *presupposed*, and the evaluative and descriptive content do not operate symmetrically in these accounts (the description is consistent but the evaluation is open to change).⁴⁰⁷ If LEGAL is construed as a thick concept its evaluative content can either be viewed as a semantic or pragmatic matter; or maybe neither, for perhaps the evaluative content is a weaker matter than the descriptive and more context sensitive. Either way the philosophical literature on thick concepts is useful for legal conceptual analysis because it raises options that have not previously been discussed in the legal context. In sympathy with Enoch and Toh, my thesis does not need to take sides regarding this particular dispute to be able to demonstrate the usefulness of the distinction for law.⁴⁰⁸

These observations about the location of evaluation can help to illuminate Hart's distinction between internal and external standpoint within the context of competency with thick concepts such as LEGAL. Internal participants to the practice adopt the associated normative judgment-assumed or presupposed by their use of thick concepts such as LEGAL, because these underlying normative judgments are part of the semantic value of the thick concept. Hart's distinction between internal and external participants (thick concept users) questions the ability of the external observer to understand and adopt the semantic value of thick concepts such as LEGAL – to what extent can they participate competently in discussions of legal validity without sincerely committing to the associated normative judgment-assumed or presupposed (the semantic value) by the internal thick concept user?⁴⁰⁹ The literature on ethical thick concepts explores the nature of this supposed normative commitment (see chapter three) and could therefore

⁴⁰⁷ There is much more that could be said about the difference between the semantic and pragmatic approach to evaluation in thick concepts, for a more detailed discussion see: Pekka Vayrynen, 'Thick Concepts and Variability' (2011) 11 (1) *Philosophers Imprint* 1. More details on these matters will be drawn out throughout the next three chapters regarding the legal application of thick and thin concepts.

⁴⁰⁸ There are actually many more options than the two constructions - semantic and pragmatic – cited in the text (but these are the two options addressed by Enoch and Toh). Although I have portrayed only the location of evaluation as the contentious aspect of a thick concept so far, the location of the description (as well as the evaluation) can be challenged in thinner concepts. There is a direct correlation between these aspects of the thick-thin debate and the distinction between a difference of degree and a difference of kind. Although the following statement may not be applicable to all theorists, it is often the case that those theorists who advance a difference of kind are more likely to see the location of description as settled, whereas those who advance a difference of degree are more likely to see both the location of description and evaluation as unsettled.

⁴⁰⁹ Stalnaker highlights this feature of the pragmatic account: the speaker is not required to believe what he presupposes, he can simply presuppose something because it is convenient to proceed on the basis of such assumption(s) in that particular conversation. See: Robert Stalnaker, 'Assertion' in *Context and Content* (Oxford University Press, 1999), 78-95

be useful to discussions of thick concepts such as LEGAL and Hart's internal/external distinction. The external observer could adopt a temporary or pretended commitment to the relevant normative judgment, where the judgment isn't presupposed and is instead *a part of* what he says or asserts. On this understanding his evaluative or normative commitment could be treated semantically.⁴¹⁰ These explanations requires the outsider to try to adopt the point of view of the internal participant, but differ over the extent to which the internal and external thick concept users have to share the semantic value for the thick concept. The first explanation requires them to share the same semantic value, but allows for two explanations of the relevant presupposition. If the relevant presupposition does not require a belief or some other belief –like commitment, the two would still be using the term with the same semantic value, even though the external thick concept user did not share the same presupposition. The two participants have different semantic values for the thick term, but in this situation the external thick concept user temporarily adopts the internal thick concept users' semantic value.

Even if the external participant's ability to grasp the semantic value can be explained (see above), their ability to grasp the evaluative standpoint of the concept must also be accounted for. Construing LEGAL as a thick concept therefore has implications for legal notions of evaluative standpoint, and how we can account for the external participant's ability to grasp evaluative standpoint. Enoch and Toh highlight two well-known challenges to Hart's idea of an external standpoint:

Dworkin's claim that judgments as to what the law is (and more generally what he calls "constructive interpretations") require judging persons to attribute some "point" or "justifying purpose" to the practices and traditions that make up the legal systems whose laws they are interpreting and Raz's claim that legal judgments are judgments who take "the legal point of view" whether that point of view is assumed sincerely or insincerely. Both of these claims arose out of the belief that what the law is could not be characterised accurately from what Hart called the external point of view, or the belief that there is a distinction to be observed between what the

⁴¹⁰ For a relevant discussion of simulation that could be serviceable here see: Stephen Yablo, 'Go Figure: A Path through Fictionalism' reprinted in *Things* (Oxford University Press, 2010), 177-199. He opines that the belief of S (the simulation) could be *per accidens*, one significant implication of this is that the person who is simulating the belief need not be aware it is a simulation he does believe (this may only become apparent after critical reflection). Yablo attributes this notion to Kendall Walton, 'Spelunking, Simulation, and Slime: On Being Moved by Fiction' in M. Hjort and S. Laver (eds), *Emotion and the Arts* (Oxford University Press, 1997), 37-49

members of a community think that a practice requires and what it “really requires”.⁴¹¹

The above discussion between Hart, Dworkin and Raz concerns the extent to which an external participant to a practice needs to be able to ‘join in’ the practice to be able to characterize legal practices in a manner similar to someone internal to the practice. Significantly, the literature concerning thick concepts also considers the extent to which concept users need to “join in” the conceptual practices that they are trying to understand. Enoch and Toh draw on this similarity and argue that understanding ‘legal’ because of its thickness necessarily involves understanding the evaluative content captured by the evaluative standpoint of *LEGAL*.⁴¹²

Enoch and Toh’s thesis then raises familiar issues regarding the location of evaluation in thick concepts (such as *LEGAL*) that were raised in the previous chapter. Compare the following two examples: *COURAGEOUS* and *PHYSICALLY STRENUOUS*. ‘Physically strenuous’ seems to be thinner than ‘courageous’ because there is less need to understand an associated evaluative standpoint to be able to apply this concept (some theorists may argue that there is no need - if it is construed as a thin concept and thin concepts are understood to be purely descriptive then the issue of evaluative standpoint will not arise). It does not seem to be necessary to understand that in some circumstances this term will convey an underlying evaluation (such as an endorsement).⁴¹³ ‘Courageous’ seems to be thicker than ‘physically strenuous’ because an application of the term seems to require an understanding of the underlying normative judgment that is typically associated with *COURAGE*: e.g. standing up to fear

⁴¹¹ see note 378 at 270-271

For Dworkin’s claims regarding ‘constructive interpretations’ see note 395 at 47 and Ronald Dworkin, ‘Hard Cases’ reprinted in *Taking Rights Seriously* (Harvard University Press, 1977), 101-105.

Similar claims are made in the following texts: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) in chapter one; Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964), in chapter four; and M. Murphy, ‘Natural law Theory’ in M. Golding and W. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2004), 15-28

On the distinction between what members of a community think a practice requires and what it ‘really requires’ see: note 399 at 64; Joseph Raz, *Practical Reason and Norms* (Princeton University Press, 2nd edition, 1990), 175; and Joseph Raz, ‘Postscript Sources, Normativity, and Individuation 1’ in *The Concept of a Legal System* (Clarendon Press, 2nd edition, 1980), 235-6

⁴¹² This raises many questions concerning difference of degree and kind, again. If the distinction between thick and thin concepts is a matter of degree (Enoch and Toh see things this way, see my previous chapter regarding this) then is our understanding of the evaluative content also a matter of degree? Maybe the disagreement between Hart, Dworkin and Raz can be seen as a disagreement over the degree of understanding that is required for someone to be classed as internal to the practice rather than external; or to put it another way it is a disagreement about the degree to which you need to ‘join in’ the practice.

⁴¹³ see note 378 at 271

or danger in some situation as a good thing.⁴¹⁴ In the previous chapter the difference between viewing the location of evaluation in concepts such as COURAGE as a semantic or pragmatic matter was raised.⁴¹⁵ Returning to these issues now: ‘If evaluation is a matter of the semantics of thick terms, then if the evaluative thought conveyed is false, so is the relevant judgment as a whole... In general, if we go for a semantic answer to the location-of-evaluation question, we seem to think of the evaluative and descriptive elements of thick concepts symmetrically, as equal partners in constituting the relevant concept.’⁴¹⁶ According to pragmatic accounts: ‘the relevant evaluation is conversationally implicated or is presupposed. On such pragmatic accounts, there is an important difference between the descriptive and the evaluative elements of thick concepts.’⁴¹⁷ Thus the pragmatic and semantic accounts of COURAGE seem to disagree over the extent to which it would be possible to use thick concepts such as COURAGE without engaging with the associated evaluations; and whether (if it was possible) this external use would be parasitic upon the more evaluatively charged internal-point-of-view-ish use of COURAGE.

Dworkin and Raz can be seen as viewing LEGAL as similar to COURAGEOUS (or FASHIONABLE) rather than PHYSICALLY STRENUOUS, because they require the LEGAL concept user to join in the practice and take up the evaluative content associated with LEGAL before they can understand fully or master the concept.⁴¹⁸ There are different ways to join in a practice and the two philosophers’ attitudes differ here regarding what is necessary for joining in. Enoch and Toh surmise that ‘the attitudes that the two philosophers deem necessary for joining in – the “point”, attributing interpretive attitudes and “the legal point of view”, respectively – could be cashed out in terms of the normative judgment that underlies the uses of the thick term “legal”, and that

⁴¹⁴ There are other ways of characterizing the evaluative standpoint of COURAGE these will be dependent on the shared evaluative standpoint of the evaluative community under consideration. It could also be argued that this evaluation is flexible and open to change depending upon the context it is applied in.

⁴¹⁵ For example “it was courageous of her to stand up to her boss in that way” could commit the speaker not just to the relevant descriptive content (“Standing up to her boss in that way involved overcoming some fear”), and not just to some additional evaluative ‘colouring’ (“and hurray for that!”), but also to an underlying normative or evaluative commitment such as “overcoming fear is often the morally right thing to do, or that many acts that involve overcoming fear are the better for it.”

⁴¹⁶ see note 378 at 261

⁴¹⁷ *ibid*

⁴¹⁸ In chapter two I noted that within the literature on concepts there is widespread disagreement regarding what it means to ‘fully understand’ or ‘master’ a particular concept; or to be a ‘fully fledged thick concept user’ (this is how meta-ethicists have phrased the same point). There is not room in this thesis to enter into such a lengthy and complex debate, but it is important to highlight that the differences between Hart, Dworkin and Raz could be seen as differences in terms of the degree of ‘conceptual mastery’ that each requires of internal and external participants.

commitment could be characterized either pragmatically or semantically.⁴¹⁹ If an insider is taken to be someone who is sincerely and fully committed to the relevant normative judgment then in contrast the outsider can be viewed as someone who does not have this level of normative commitment (which could vary in degree e.g. from only slightly to substantially less). Dworkin seems to think the outsider would only be able to achieve a limited understanding of what the law really requires, as he would be handicapped by his lack of relevant normative commitment.⁴²⁰ Raz doesn't think that the outsider will be limited to such an extent; he envisages that the outsider will be able to temporarily adopt the required relevant normative commitment for the conversation at hand and therefore accurately understand characterizations of what the law really requires. This temporary commitment could be pragmatic or semantic.

As can be seen from the above discussion of Hart, Dworkin and Raz, thick and thin concepts can not only better enrich our understanding of the norms and evaluations advanced by Hart's legal theory (the evaluative standpoint conveyed by legal concepts); but it can also enrich our understanding of the nature of the interchanges between Hart and his critics in this area, which is essentially a disagreement over which legal theory captures our legal practices (the nature of law). However, it is important to note that further progress in my argument regarding the debate between Hart, Dworkin and Raz on these aspects of internalist versus externalist accounts of law, would not only require the acceptance of *LEGAL* as a thick (or thicker) concept, but it would also require an accurate account of thick concepts.⁴²¹

For the purpose of this study it is possible to note (without a universally settled/agreed upon account of thick and thin concepts) how the distinction between difference of degree and a difference of kind could impact upon Hart, Dworkin and Raz's disagreement (i.e., on their opposing viewpoints). For example, if an explanation of the distinction between thick and thin concepts is treated as being a difference of degree was accepted (where the distinction picked out relative levels of thick/thin

⁴¹⁹ *ibid* at 271

⁴²⁰ see note 368 at 101-113

⁴²¹ As demonstrated throughout this study the nature of concepts (including thick and thin concepts) is far from settled, theorists are yet to agree upon the account of thick and thin concepts that most accurately reflects our conceptual practices; but such disagreement and controversy does not mean that it is not worth pursuing these matters or that interesting ideas cannot be generated by the discussions of these ideas (even if an agreement or resolution is not generated). In the previous chapter I highlighted that there is no reason to expect a uniform answer to the issues pertaining to thick and thin concepts, it is important to once again remember this point.

content along a scale), the disagreement between Dworkin, Raz and Hart may too be a disagreement over degree only. Their argument could then be seen as a disagreement regarding the thickness of the evaluative aspect of legal and the degree to which an outsider could be a competent user of the term 'legal'. This would account for those theorists who have always argued that Dworkin and Hart are not so vehemently opposed as many critics suggest (that is, that their positions are more compatible than it seems). Whereas, if an explanation of the distinction between thick and thin concepts as being a difference of kind was accepted (where the distinction picked out two different *kinds* of concept whose membership is based on a concept being either thick or thin, but never both), then the disagreement between Dworkin, Raz and Hart may too be a disagreement of kind. In this instance their positions would be more distinct from each other, rather than differing regarding the level (degree) of conceptual competence that is required of the internal participant in comparison to the external observer, they would differ regarding the kind of conceptual competence that was perceived to be required.

The differences between Dworkin, Raz and Hart could be further elucidated by considering the philosophical literature on entangling (separation) in thick concepts, which considers the nature of the relationship between the evaluative and descriptive aspect in a thick (and in some cases thin) concept.⁴²² The disagreement between Dworkin, Raz and Hart could be seen then not as a disagreement about whether there are evaluative and descriptive aspects at work here, but whether these two aspects can be separated (disentangled) and still remain intelligible. Dworkin, Raz and Hart all seem to clearly agree that there are evaluative and descriptive aspects within the law (within legal concepts, legal statements and legal judgments), because they all recognize that there is an evaluative standpoint that is a part of any legal system. The internal participant's placement within the legal system places them in a better position to understand the evaluative standpoint and both the evaluative and descriptive aspects

⁴²² Legal positivism has often been characterized as a 'purely descriptive' theory, and whilst this is an unfair and inaccurate characterization it does highlight a methodological problem associated with legal positivism. Contemporary legal positivists (such as Hart) have noted that the construction of theory is not purely descriptive, it necessarily involves elements of evaluation and selection, but that the forms of evaluation and selection are not traditional moral evaluations, they go to judgments of 'importance.' Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001) Stephen Perry and Ronald Dworkin argue that moral theory ineluctably involves moral evaluations, the question that can be sensibly asked about these moral evaluations: is whether they are explicit choices (argued for) or tacit (lack express justification). Stephen R. Perry, 'Interpretation and Methodology in Legal Theory' in Andrei Marmor (ed), *Law and Interpretation* (Clarendon Press, 1995), 97-135

of the law (legal concepts, legal statements and legal judgments). But this is only problematic if the evaluative and descriptive aspect of the thick and thin concepts cannot be clearly separated, and so it is necessary to understand evaluative standpoint to understand the thick concept.

However, there is an alternative approach to all the issues considered above that draws on separationism. Separationists have argued that those external to the practice can still demonstrate conceptual competence because the evaluative and descriptive aspects of thick concepts (and maybe thin concepts) can be understood separately. According to this approach the external observer only needs to understand the *descriptive* aspect and not the evaluative standpoint to be able to understand the legal practices of a legal system and thus to demonstrate conceptual competence regarding the law; because for every thick concept that combines evaluation and description a purely descriptive concept can be identified, that picks out the same objects or identifies the same things as falling under the concept (has the same conceptual extensions). This is important, for as Bix notes, the popularity of legal positivism is in part linked to the positivist separation of the evaluative and descriptive aspects of law: ‘the notion that the description of a practice or an institution should be prior to and separate from its evaluation seems to modern audiences too obvious to need declaration, let alone justification.’⁴²³

Consider once more Enoch and Toh’s example of *LEGAL*, different accounts of the nature of thick concepts will yield different analyses of the thick concept *LEGAL*, which will in turn yield different results regarding the nature of law. As Enoch and Toh argue: ‘a better understanding of legal statements may depend on the true nature of thick concepts. For instance, if separabilists or disentanglers have it right *in general*, so that at least in principle it should always be possible to disentangle the normative and descriptive elements of thick concepts, then this will apply to the case of *legal* as well.’⁴²⁴ Such universal statements should be treated with caution though, as there is no reason to assume that the answer to the location of the evaluative aspect will be uniform across the entire class of thick concepts and terms.⁴²⁵ Even if we accept

⁴²³ Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 6th edition, 2012), 34. This was not always the case, as recently as the 19th century natural law was the default position.

⁴²⁴ *ibid* at 267

⁴²⁵ Williams was keen to dispute the notion of a homogenous class of ethical assertions as a fiction see note 374

that as a general rule thick legal concepts behave according to the separabilist account, we still need to ask whether a specific thick concept such as LEGAL behaves this way. It is common practice in law (and in many other areas) to stipulate a meaning (use) for a technical term and this needs to be reflected in discussions of thickness and thinness. Many of the legal statements by judges and legislators are prime examples of this, so construing the term ‘legal’ thickly should not be taken as a conclusive denial or limit to this feature of legal conceptual practice.

It is not necessary to explore these options (non-separationism/separationism) further because the aim has simply been to demonstrate that the distinction between thick and thin concepts can be useful in discussing matters pertaining to Hart’s legal positivism; it is instead more beneficial to demonstrate the usefulness of these ideas in relation to another aspect of Hart’s work.

My discussion now moves away from the conceptual abilities of the internal participant/external observer in general, and towards understanding and explication of specific legal concepts such as LEGAL. LEGAL VALIDITY in *The Concept of Law* is determined by adherence to the rule of recognition and it is the rule of recognition that now becomes the focus of my investigation. The rule of recognition is one of Hart’s central theses and is an extension of his ideas regarding the internal and external divide within law (it relates to the above discussion of evaluative standpoint and to what extent it is necessary to ‘join in’ a practice, so some of the ideas discussed above will be relevant to my discussion of the rule of recognition).⁴²⁶ By discussing two related but distinct aspects of *The Concept of Law* (the internal and external divide, and the rule of recognition) strength is added to the argument advanced in this chapter (that thick and thin concepts can enrich our understanding of Hart’s legal positivism) and thus to the overarching thesis that I develop throughout (that thick and thin concepts are useful within law).

⁴²⁶ The distinction between difference of kind and degree surfaces here again, because if the distinction between thick and thin legal concepts is based on a difference of kind, then the above discussion applies only to the rule of recognition and other thick legal concepts. If it is based on a difference of degree then the same discussion could be theoretically applicable to thinner legal concepts as well, because they would also involve a combination of descriptive and evaluative content, which would raise the issues of entangling and separation.

3 - The Rule of Recognition.

As stated at the beginning of this chapter Hart's distinction between the internal and external perspective has important implications for many other aspects of his theory. The distinction between an internal and an external perspective is not always clear-cut, as it appears the distinction can often be a matter of degree. The distinction can sometimes become blurred because many aspects of our legal system seem to exhibit qualities of an internal perspective *and* an external perspective. The Rule of Recognition is a prime example of this: it is internal to the practice and identification of it by the practice is internal, requiring a grasp of the evaluative standpoint of the legal system (i.e. of the relevant legal culture); but it can also be described externally and its existence can be verified by an external observer. It is through the Rule of Recognition that Hart blends evaluative standpoint with empirical criteria to provide a kind of practice-specific objectivity for the criteria of legal validity.⁴²⁷ The following section continues to demonstrate the usefulness of thick and thin concepts in understanding the role evaluative standpoint plays in *The Concept of Law*, this time through the rule of recognition; which is one of the most well-known and enduring topics of debate between positivists and non-positivists.⁴²⁸

Hart's exposition of the rule of recognition.

Hart outlines the nature of the rule of recognition and its relationship with other rules of the legal system as follows:

⁴²⁷ Feldman takes a similar approach when she formulates her 'blend conception of objectivity', addressed in the next chapter. See: Heidi Li Feldman, 'Objectivity in Legal Judgment' (1994) 92 (5) *Michigan Law Review* 1187

⁴²⁸ Dworkin and Raz's writings on Hart's rule of recognition are the most well known, see: Ronald Dworkin, *Taking Rights Seriously* (Duckworth, new impression with a Reply to Critics, 2005) chapters one and two; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) chapter one; Joseph Raz, 'Authority, Law and Morality' in *Ethics in the Public Domain* (Clarendon Press, 1994). The rule of recognition has attracted attention from many legal theorists, such as Scott Shapiro who argued that it is in the nature of legal rules that they make a difference to practical reasoning, the inclusive nature of the rule of recognition limits its ability to make a difference to practical reasoning, it points towards the moral evaluations that are already applicable to our choices. Scott J. Shapiro, 'On Hart's Way Out' (1998) 4 *Legal Theory* 469

See the following additional literature that addresses the rule of recognition: Leslie Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687; John Gardner, 'Legal Positivism: 5 ½ myths' (2001) 46 *American Journal of Jurisprudence* 199; Scott Shapiro, 'The Hart-Dworkin debate: a guide for the perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press, 2007); Brian Leiter, 'Explaining theoretical disagreement' (2009) 76 *University of Chicago Law Review* 1215; John Gardner, 'Some types of law' in *Law as a Leap of Faith* (Oxford University Press, 2012)

A secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundations of a legal system.....Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases.... In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy.... For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors.⁴²⁹

As can be seen from Hart's explanation above, he believes that the rule of recognition plays an important role in identifying the law (the primary and secondary rules) in any particular legal system (i.e., in any legal culture), but the ability of the rule of recognition to perform such a role has received widespread critique.⁴³⁰ The rule of recognition is the analytic tool Hart uses to secure his political and social project, creating a union of primary and secondary rules.

⁴²⁹ see note 361 at 100-101

⁴³⁰ Dworkin's attack on Hart's theory (in particular the rule of recognition) challenges Hart to account for 'theoretical disagreement' in law, which is based on the seemingly innocent observation that judges 'disagree about the grounds of law, about which other kinds of propositions, when true, make a particular proposition of law true.' See note 395 at 5. 'The grounds of law' is another term for the rule of recognition, therefore Dworkin's argument suggests that judges disagree over the content of the rule of recognition, and this raises serious doubts over the capability of the rule of recognition to perform the role Hart attributes to it.

Both Leiter and Gardner have challenged the nature of the disagreement that Dworkin highlights and suggest that they actually demonstrate differences over the content of the rule of recognition. Brian Leiter, 'Explaining theoretical disagreement' (2009) 76 *University of Chicago Law Review* 1215, 1224; and John Gardner, 'Some types of law' in *Law as a Leap of Faith* (Oxford University Press, 2012), 71-72 and 73-74

In his Postscript Hart had softened his views on the role of the rule of recognition. He protested against the idea asserted by many of his critics (such as Dworkin) that: 'the rule is meant to determine completely the legal result in a particular case, so that any legal issue arising in any case could simply be solved by mere appeal to the criteria or tests provided by the rule...[T]his is a misconception: the function of the rule is to determine only the general conditions which correct legal decisions must satisfy in modern systems of law.' H. L. A. Hart, 'The Postscript' in *The Concept of Law* (Oxford University Press, 2nd edition, 1994), 258

Many critics have found issue with the rule of recognition because it is ‘slippery’, or claiming that it seems very similar to Kelsen’s Grundnorm.⁴³¹ Dworkin, for example, criticizes Hart for attributing a central role to the rule of recognition because he thinks there must be something that stands beyond the rule of recognition in our determination of legal validity.⁴³² And indeed, Hart is careful to make it clear that there is more to law than the rule of recognition. It is not the whole thing, but in terms of analytic description of the existence of a legal system, what has most explanatory power in our elucidation of a legal system, is that there is a rule of recognition that is open to change. Nonetheless, many theorists see this apparent vagueness as a sign of weakness.⁴³³

In practice the rule of recognition is never explicitly stated, but is used by legal practitioners when identifying legal rules, which is why Hart argues it ‘is characteristic of the internal point of view.’⁴³⁴ The legal practitioners’ use of the rule of recognition carries with it an endorsement that it is characteristic of the internal point of view ‘and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view.’⁴³⁵ The rule of recognition is closely connected to the evaluative standpoint of the law and its internal location within the legal system means that its existence cannot be challenged. Hart states: ‘the rule of recognition exists only as a complex, but normally concordant, practice of the courts,

⁴³¹ Dennis Patterson argues that Hart’s Rule of Recognition is flawed because law is not as the positivist’s conceive – social facts do not make propositions of law true, law cannot be conceived of as social or institutional facts that operate in a similar way to scientific propositions regarding truth-aptness – it is not akin to science. ‘The truth of a proposition of law is the product of an activity (justification) and is not a matter of correspondence between a proposition and a social fact.’ Dennis Patterson, *Law and Truth* (Oxford University Press, 1999), 64

See also: Margaret Davies, *Asking the Law Question* (Law Book Co of Australasia, 2nd edition, 2002)

⁴³² Dworkin has been the chief opponent of the Rule of Recognition, he begins *Laws Empire* by contending that Hart (amongst other theorists) suffer from a ‘semantic sting’: ‘they insist that lawyers all follow certain linguistic criteria for judging propositions of law.’ See note 395 at 32 and 45. Dworkin argues that Hart (and theorists like him) all fail to explain theoretical disagreement in law because they operate under the mistaken assumption that the language of law can be meaningful only if lawyers all share the same uncontroversial tests for the meaning of a word (criteria) for determining the truth of propositions of law. It leads to the conclusion that people cannot have any substantive/genuine disagreement about law instead their disagreements must be empirical, about penumbral cases or about what the law ought to be. Hart is not the only target of the semantic sting Dworkin’s criticism extends to all semantic theorists and their semantic theories of law.

Hart denied that his theory suffered from the semantic sting, see note 361 at 246

⁴³³ Hart acknowledges that the value of the rule of recognition can be challenged (this is the aspect of the rule of recognition that can then be open to change in response to such challenges), but its existence can never be challenged. *ibid* at 107-109

Dworkin was unsatisfied by Hart’s claim that the Rule of Recognition could be vague like other legal rules, for the Rule of Recognition to be able to provide a way of identifying the law, the tests provided need to be complete and uncontroversial otherwise there is no shared way of identifying the law.

⁴³⁴ *ibid* at 102

⁴³⁵ *ibid*

officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.⁴³⁶

The rule of recognition straddles both the distinction between internal and external perspectives because it exists within the practice (is internal to the practice) and any such statement of it (often implied through behaviour) is internal; but statements regarding the rule of recognition's legal validity are external statements of fact.⁴³⁷ The rule of recognition is analytically entailed by a legal system in the same way that an evaluative standpoint is analytically entailed; in this sense it is no different from any other social practice. Hart challenges the notion that we have put law on a pedestal and assume that it is in some mythical way different and more important than all our other practices, demonstrating instead that law is still simply participation in social practice (although the practice can still be challenged and questioned).

The above outline of Hart's exposition of the rule of recognition could of course be elaborated further as there is much to say (and much has been written) about this aspect of his work, but as my thesis argues for the usefulness of thick and thin concepts within law it is more beneficial to move away from exposition and towards comparison with the meta-ethical literature. The meta-ethical literature on evaluative standpoint (addressed above) can be useful here also. Wittgenstein's work on game theory has influenced the notion of evaluative standpoint in many disciplines including meta-ethics and law. Hart draws on Wittgenstein's game theory to articulate his points about the rule of recognition and to demonstrate that we have many rules of recognition in many different practices and, as we all know what it is to be a participant to a practice, why should law be any different.⁴³⁸ Yet it is the nature of this participation – what it means to be an internal participant rather than an external participant – in a legal practice that is under contention. There are other aspects of Williams' work (besides evaluative standpoint) that can be used to draw relevant analogies here, and it is to

⁴³⁶ *ibid* at 110

⁴³⁷ There is no necessary connection between the validity of any particular rule and its efficacy, unless the rule of recognition expresses among its criteria that no rule is to count as a rule of that system if it ceases to be efficacious.

⁴³⁸ Hart explicitly recognizes the influence of Wittgenstein, *ibid* at 280 and 297. He also draws analogies between law and games in his other works, see: H. L. A. Hart, 'Definition and theory in jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983). He states: 'The economist or the scientist often uses a simple model with which to understand the complex; and this can be done for law. So in what follows I shall use as a simple analogy the rule of a game which at many vital points have the same puzzling logical structure as rules of law.' *ibid* at 26-27

these the discussion now turns, as evaluative standpoint was discussed in the previous section and many of the same points are applicable to the rule of recognition.

4 – Extending the discussion of the Rule of Recognition.

The rule of recognition is clearly concerned with action-guidance and this is hardly surprising considering the normativity of law (often itself characterized in terms of action-guidance). Hart's identification of the rule of recognition as the criterion for legal validity attributes to it an action-guiding role: it guides the actions of participants of the legal practice in their identification of valid legal rules (and concepts). Action-guidance is closely tied to evaluative standpoint, in which action-guidance is a reflection of underlying normative judgments and evaluations captured by evaluative standpoint.

Williams' thick terms and concepts rely on a combination of both action-guiding and world-guided content and the world-guided aspect of thick concepts is also relevant to better understanding the rule of recognition. The potential world-guidedness of the rule of recognition refers to its ability to identify features of the way the world really is and this requires us to consider the kind of world-guidedness that could be identified by the rule of recognition. Hart has already stated that although we can find a rule of recognition in any legal system, the nature of that rule of recognition will be specific to a particular community's evaluative standpoint it is a reflection of. The world-guided content therefore refers to the way the world actually is in that particular community, but this community specific notion of world-guidedness is different from the traditional notion of empirical knowledge. As we have already seen, Williams accounts for this by drawing a distinction between two kinds of worlds - the 'social world' and the physical 'science world' – after considering the legal context more closely, Williams claims that the kind of world-guided content associated with the rule of recognition is 'social world-guidedness'. Even if Williams' distinction between the 'social world' and the physical 'science world' and his conclusion that the kind of world-guided content associated with the legal context is 'social world-guidedness' is incompatible with accounts of law that are influenced by empiricism (and therefore view law as belonging to the physical 'science world'); Williams' discussion of world-guidedness will still be of interest to those legal theorists engaging with legal positivist

jurisprudence (particularly the jurisprudential debates concerning the rule of recognition). Another example of a legal positivist thesis where it could be useful to consider the nature of social world-guidedness, is the sources thesis.⁴³⁹

The sources thesis clearly locates law within the ‘social world’ as Williams categorizes it, but the sources thesis is intended to provide empirical criteria rather than evaluative. Williams’ distinction locates thick and thin ethical concepts as existing within the social world(s) and his definition of thick and thin in terms of action-guiding and world-guided content, when applied to legal concepts, necessarily adds some form of evaluative dimension to all legal concepts in terms of action-guidance.⁴⁴⁰ Reference to evaluative criteria becomes a *necessary* part of the rule of recognition because the rule of recognition identifies the ‘social facts’ of a particular social practice.⁴⁴¹ If the rule of recognition is reflective of the social practice that it belongs to, then the rule of recognition must be evaluative at least to the extent that it conveys the evaluative standpoint of that particular ‘social world’ (culture). Hart seems to accept this because the rule of recognition is based on the social practices of the officials of the legal system.⁴⁴²

⁴³⁹ Raz identifies the sources thesis as follows: ‘All law is source-based. A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.’ Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, 1994), 194-5

⁴⁴⁰ If we consider the role of evaluative standpoint in the sources thesis in terms of action-guidance, it is important to note that this still requires us to understand the evaluative reasons behind that particular action-guidance, but the reasons for action-guidance may not be evaluative in the standard ethical sense. It could be the best course of action for financial reasons, or it could be based on a principle such as utility. Whilst we may be required to understand the role of action-guidance in the legal norms we are identifying, this does not require us to endorse the evaluation behind that action-guidance. As Williams argues the link to action-guidance is only typical and maybe indirect, there may be other reasons that override. For example a judge may identify a source of law as applicable in a particular case, and whilst it may conflict with his ideology, his application of the law may stem from other reasons that override his ideological conflict, such as respect for the Rule of Law above all else. The connection between evaluation and the identification of law (the sources thesis) may not be as straightforward as first imagined, as demonstrated by the above analogy with Williams’ action-guidance.

⁴⁴¹ Both action-guiding and world-guided content are an important aspect of ‘social facts,’ both kinds of content are therefore captured by the ‘social thesis,’ although I do not discuss this in my thesis.

⁴⁴² Shapiro argues that basing the rule of recognition on the practices of legal officials gives rise to what he has termed a ‘chicken and egg’ problem. Scott J. Shapiro, ‘On Hart’s Way Out’ (1998) 4 *Legal Theory* 469; and Scott Shapiro, *Legality* (Harvard University Press, 2011), 36-40. If the existence of the rule of recognition is dependent upon the existence of legal officials, then this seems to presuppose the existence of a legal system within which they are officials and are endowed with legal powers, and the existence of a legal system is dependent on the existence of a rule of recognition. Hence Shapiro asks – what came first, the officials or the rule of recognition? Hart seems to be required to answer that the officials came first (otherwise he must abandon his claim that the existence of the rule of recognition depends on the practices of legal officials), but this then leaves open the question – where did the officials come from?

There needs to be more careful consideration of what we mean by the ‘evaluative’ in law, particularly in the case of the sources thesis and utilizing Williams’ ideas on evaluative standpoint in thick concepts can help unpick the nature of this evaluative content.⁴⁴³ Evaluation may play a key role in the identification of legally valid norms and rules through evaluative standpoint in the guise of the rule of recognition, but this is very different to relying solely or primarily on evaluative criteria; and very different to any possibly related claims that this necessarily leads to evaluative questions/judgments such as ‘ought this be a legally valid norm/rule?’ Clarifying the nature of the evaluation operating within law is crucial to many aspects of legal positivism and has led to a division within legal positivism between inclusive and exclusive positivism.⁴⁴⁴ The meta-ethical literature can shed light on the various shapes that evaluative content can come in and the implications this diversity may have for law. The debate between inclusive and exclusive positivism notes the relevance of meta-ethics for this reason, although theorists have not drawn on the meta-ethical literature of thick and thin ethical concepts.

In remarks now contained in the Postscript Hart softened many of his earlier views and adopted an inclusive stance in response to critics (such as Dworkin). For example, he draws attention to his express statement in the first edition of *The Concept of Law*: ‘that in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of constitutional legal restraints.’⁴⁴⁵ He also noted his explicit acknowledgment: ‘that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or

⁴⁴³ The following definition of evaluation demonstrates the variety of ways that evaluation can be understood: ‘Evaluation can be understood generally as any or all of the more or less complex processes of sampling, discriminating, comparing, assessing, and selecting that constitute the ongoing activities of responsive creatures in their interactions with their environments. So understood, evaluative behavior is not confined to human beings and is not necessarily deliberative, conscious, rational, verbal, overt, or intentionally communicative – though it can, of course, be all these as well.’ Barbara Herrnstein Smith, ‘Evaluation: Cultural Evaluation’ in Michael Kelly (ed), *The Encyclopaedia of Aesthetics* (Oxford University Press, 2nd edition, 2014)

⁴⁴⁴ Jules Coleman, ‘Beyond Inclusive Legal Positivism’ (2009) 22 *Ratio Juris* 359; Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001); Kenneth Einar Himma, ‘Inclusive Legal Positivism’ in J. Coleman, S. Shapiro and K.E. Himma (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 125-165; Andrei Marmor, ‘Exclusive Legal Positivism’ in J. Coleman, S. Shapiro and K.E. Himma (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 104-124; and Scott J. Shapiro, ‘Was Inclusive Legal Positivism Founded on a Mistake?’ (2009) 22 *Ratio Juris* 326

⁴⁴⁵ H. L. A. Hart, ‘The Postscript’ in *The Concept of Law* (Oxford University Press, 2nd edition, 1994), 247

substantive values.⁴⁴⁶ The issue can be rephrased as the question: can the rule of recognition exist in a legal system where law is bounded by morality, or generated by morality (or maybe both)?⁴⁴⁷ According to soft (inclusive) legal positivism this can be the case.⁴⁴⁸ Exclusive legal positivists are often unconvinced by the inclusive positivist's argument that the rule of recognition can make legal validity a matter of conformity with moral principles or substantive values.⁴⁴⁹

Dworkin provides two versions of his argument from 'controversy'.⁴⁵⁰ It is the second version that is relevant here, which argues that it is a controversial issue in moral theory whether moral statements express truth-apt beliefs about the way the world is, thereby arbitrating between correct and incorrect beliefs.⁴⁵¹ On this count Dworkin explicitly refers to the meta-ethical literature on cognitivism and non-cognitivism, and although he does not refer to Williams or thick ethical concepts, they are also relevant to his argument. McBride and Steel summarise the point well: 'if the rule of recognition of a legal system made the validity of a legal rule dependent on morality, then what the law said on a particular issue would depend on which of these

⁴⁴⁶ *ibid* at 250

⁴⁴⁷ Nicholas McBride and Sandy Steel suggest two possible ways the rule of recognition could make the content of law dependent on morality: '(1) The first is to say that a rule with a particular pedigree will count as a valid legal rule *unless* it violates some moral standard. Some would say that this is the position under the US Constitution, where a legal rule contained in an act of Congress will count as a valid legal rule unless it violates a moral standard set out in the US Constitution such as the 8th Amendment to the Constitution which forbids, among other things, the infliction of "cruel and unusual punishments." (2) The second is to say that a rule will count as a valid legal rule if it satisfies a test that requires one to evaluate the content of the rule. An example might be the mini rule of recognition determining whether or not one person will owe another a duty of care under the test laid out in the case of *Caparo Industries plc v Dickman*. Under the *Caparo* test, a defendant will owe a claimant a duty of care if (1) it is foreseeable that the claimant would suffer some kind of harm if the defendant were careless; (2) the defendant and the claimant were in a sufficiently proximate relationship; and (3) it would be "fair, just and reasonable" to find that the defendant owed the claimant a duty of care.'

Nicholas J. McBride and Sandy Steel, *Jurisprudence* (Palgrave, 2014), 52-53

Caparo Industries plc v Dickman [1990] 2 AC 605, 617-618

⁴⁴⁸ Hart was responding to the 'pedigree thesis' (the criteria for legal validity concerns the pedigree of legal rules – the manner in which they were adopted or developed). Ronald Dworkin, *Taking Rights Seriously* (Duckworth, new impression with a Reply to Critics, 2005), 17

⁴⁴⁹ Dworkin and Raz have both rejected this aspect of Hart's account, this chapter looks at Dworkin's rejection - the argument from controversy – as this provides more useful analogy with the meta-ethical literature.

⁴⁵⁰ The first version argues that if we accept that the rule of recognition owes its existence to shared acceptance by the legal officials within a legal system, that shared acceptance must permeate both concrete and hard cases; but this depth of shared acceptance is impossible to maintain if the legal officials are required by the rule of recognition to make moral judgments to determine legal validity. Differences in their moral views would lead to disagreement regarding the application of the rule of recognition in particular cases. Ronald Dworkin, 'The Model of Rules II' in *Taking Rights Seriously* (Duckworth, new impression with a Reply to Critics, 2005) and Ronald Dworkin, 'A Reply by Ronald Dworkin' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1984), 253

⁴⁵¹ My earlier discussion of cognitivism and non-cognitivism in chapters two and three is relevant here.

philosophical theories about the nature of moral statements was true.⁴⁵² Dworkin is in favour of judges engaging with such complex moral issues in their determination of legal issues.⁴⁵³ He doubts that legal positivists would be quite so willing to accommodate moral debates in determining the content of the law though.⁴⁵⁴ In the *Postscript* Hart accepted that Dworkin's criticism required attention, considering that he (Hart) thought that 'the question of the objective standing of moral judgments [should be] left open to legal theory.'⁴⁵⁵ As a result, he conceded that his soft (inclusive) positivist claim that the rule of recognition could determine legal validity on the basis of morality might need replacing. He suggested that a legal system could include a secondary rule of recognition that required judges to develop or change the law in accordance with certain moral values or precepts (when required).⁴⁵⁶

The debate between inclusive and exclusive legal positivists regarding the rule of recognition and its ability to contain a moral component provides a good starting point for future research into the relevance of meta-ethics for law (in particular thick and thin ethical concepts).⁴⁵⁷ Hart's inclusive legal positivism seems to have an advantage over exclusive accounts because of the social roots of the rule of recognition, the onus shifts to the exclusive positivist to prove that the judges of a legal system could not operate

⁴⁵² Nicholas J. McBride and Sandy Steel, *Jurisprudence* (Palgrave, 2014), 54

⁴⁵³ See note 395 at 80-85 and Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011).

⁴⁵⁴ Dworkin states: 'I had thought it was part of Hart's ambition (and of the ambition of positivists generally) to make the objective standing of propositions of law independent of any controversial theory either of meta-ethics or of moral ontology.' Ronald Dworkin, 'A Reply by Ronald Dworkin' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1984), 250. Jules Coleman argues that philosophy of law is yet to engage with the cognitivist/non-cognitivist literature regarding the semantics and metaphysics of legal discourse, even though this literature has proved central to similar areas in philosophy. He notes that Dworkin and Putnam are an exception, they have both considered the relevance of cognitivism and non-cognitivism in understanding the truth-aptness of legal statements. For his discussion of this see: Jules L. Coleman, 'Truth and Objectivity in Law' (1995) 1 (1) *Legal Theory* 33

⁴⁵⁵ see note 445 at 254

⁴⁵⁶ *ibid*

This idea was derived from Raz according to McBride and Sandy Steel see note 474

⁴⁵⁷ Research in this area is still in its infancy, Jose Juan Moreso is one of the few theorists who have undertaken such research. Moreso utilizes thick and thin concepts in his defense of inclusive legal positivism, where he postulates that the rejection of moral objectivity doesn't necessarily lead to abandoning inclusive legal positivism. His use of thick concepts is brief, preferring Hare's prescriptivism over Williams' formulation (unlike many legal theorists he recognizes that these two theorists proposed conflicting accounts of thick concepts). Jose Juan Moreso, 'In defense of Inclusive Legal Positivism' in P Chiassoni (ed), *The Legal Ought Proceedings of the IVR Mid-Term Congress in Genoa 2000*, (Giappichelli, 2001)

See also Jose Juan Moreso, 'Legal Defeasibility and the Connection between Law and Morality' in Jordi Ferrer Beltran and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility*, (Oxford University Press, 2012) where he relates legal positivism to discussion of thick-intuitionism (thick intuitionism argues that moral rules are formulated with thick concepts, which are not definable in non-moral terms making them susceptible to critical attack).

with a rule of recognition that determines legal validity on the grounds of moral criteria. Dworkin's argument that the inclusive account of the rule of recognition renders the content of law dependent on the outcome of a meta-ethical debate between cognitivists and non-cognitivists, offers the most promise for the exclusive positivist camp. If the cognitivists are seen as the winners in this debate then Dworkin's challenge is unsubstantiated, but as my thesis has demonstrated (particularly in chapters two to four) there is a clear lack of consensus in the meta-ethical literature and cognitivists are yet to prove themselves the convincing winners. As noted in chapter two, the literature on thick and thin ethical concepts is an extension of the discussion between cognitivists and non-cognitivists and can provide a useful and interesting medium for discussing the wider meta-ethical issues that are relevant to conceptual analysis in law, such as the relevance of the distinction between internal and external standpoint for Hart's legal positivism and for legal concepts such as LEGAL (VALIDITY).

5 – Concluding remarks on Hart's internal/external distinction.

Hart offers an examination of law from an internal perspective, this places parameters on those who he can engage with, but it then renders attacks such as – why haven't you considered this alternative account of law? – fallacious, because they impose an external standpoint. This move by Hart is influenced by his ordinary language philosophy (Wittgenstein was a major influence) and it is a reflection of his position that you can only articulate from within your own language game. His whole thesis is based on 'recognition' – he offers illustrations to help us recognize things that we call the social phenomena of law. The concept of law Hart is concerned with is *the* concept of law for everyone for there are not multiple concepts of law, though the concept is open to extension. He is open to contrary claims that some other thing should have been included in 'the' concept of law, but this is different from the claim that there is an alternative concept of law, because that supposes that Hart should have called it 'A Concept of Law.' This misses the point and makes a fetish out of the inscription and sound. We have to occupy the standpoint of someone internal to the practice to be able to engage with and see if the definitions of law we have so far been given actually work, and Hart argues that once we realize this we can see that they don't. He

specifically attacks such generalist jurisprudence in the notes.⁴⁵⁸ Many of the criticisms or misunderstandings of Hart stem from a cultural disposition towards generalist reductionist techniques that Hart is specifically opposed to and countering in *The Concept of Law*.⁴⁵⁹ These cultural dispositions towards methodology can be seen not only in academic research, but also in teaching. My thesis argues for the use and usefulness of thick and thin concepts on the grounds that these terms (and associated ideas) can enrich our understanding of law, which includes legal education (addressed in chapter nine).

This chapter has used Hart's *The Concept of Law* as an exemplar of a legal theory (and an aspect of law) that can be illuminated through the application of Williams' work on thick and thin concepts, with the aim of therefore demonstrating the use and usefulness of thick and thin concepts within law (particularly in relation to enriching our understanding of specific legal theories, such as Hart's legal positivism). This chapter has focused on Hart's discussion of the internal/external standpoint because it is one aspect of Hart's thesis where Williams' work on thick concepts can be most usefully applied; and because the internal/external standpoint is also of direct relevance to the teaching of law in law schools. Legal education seems to be an internal practice – it is taught by members of the practice to those who are becoming members of the practice – it teaches students how to determine the answer to one key question: what is it I ought to do (as a lawyer/law student)? Yet when we examine law school module outlines it is becoming increasingly popular to look outside of law (the legal practice) for answers, and these new directions and taught modules are increasingly focusing on the external standpoint; e.g. 'law and literature,' 'race, religion and law,' and 'law, science and technology.'⁴⁶⁰ Recently, following Hart, the whole idea of the enterprise of law has been imagined as predicated on there being a practice - an internal normative practice - that participants recognizing law as social phenomena engage in (legal positivists such as Hart particularly agreed with this approach towards law).

⁴⁵⁸ see note 361 at 283-285

⁴⁵⁹ For example see: Margaret Davies, *Asking the Law Question* (Law Book Co of Australasia, 2nd edition, 2002). Davies criticizes Hart for having a closed and systematic account of law, which excludes everything that does not fit his predetermined picture of the law (which happens to correspond to western democratic states). This could not be further from the truth, Hart's account does not reserve the 'legal' for characteristics which attach only to modern western developed systemic jurisprudence. See: H. L. A. Hart, 'Laws as the union of Primary and Secondary Rules' in *The Concept of Law* (Oxford University Press, 2nd edition 1994), 79-91

⁴⁶⁰ These are all optional modules offered by the University of Kent for students at stage two or three of their degree.

Thus we are nowhere better positioned to embrace that study than within law schools, but Dworkin (and others) think that almost everywhere law schools have done everything *but* this. The disagreement between those theorists who think the study of law should be an internal normative practice and those theorists who think our understanding of law can be illuminated by looking outside of law to other practices remains a prominent issue within legal education. The recent Legal Education and Training Review,⁴⁶¹ by arguing that students need a broader knowledge base that includes an understanding of external influences on the law such as economics and business, has added to the need to rethink matters pertaining to legal education (how we teach the law).

I consider the topic of legal education further in chapter nine, but in the next chapter I continue my discussion of the usefulness of thick and thin concepts for law in the context of key jurisprudential debates as this provides further evidence of the usefulness of thick and thin in law (thereby presaging the discussion of legal education to come).

⁴⁶¹ Work commenced on the Legal Education and Training Review in May 2011 and the report was published in June 2013.

Chapter Seven: Thick and Thin and Other Key Jurisprudential debates

1 – Introduction.

Hilary Putnam is one of many authors who have noted that the philosophy of law shares many core philosophical concerns with meta-ethics, observing ‘In recent years we have come to see that there are intimate connections between questions in meta-ethics, in philosophy of law, and in the theory of truth.’⁴⁶² The previous two chapters demonstrated the usefulness of thick and thin concepts regarding the nature of law. This chapter develops the discussion further in relation to the shared core philosophical concerns that must be addressed by any legal theory and that have traditionally perplexed jurists.⁴⁶³ This chapter focuses on two aspects of the legal system and legal practices that have received widespread attention in jurisprudence – the judiciary and legal objectivity – because certain legal theorists writing on these aspects of law - have already begun to draw on the philosophical literature of thickness and thinness.⁴⁶⁴

⁴⁶² Hilary Putnam, ‘Are Moral and Legal Values Made or Discovered?’ (1995) 1 *Legal Theory* 5. Putnam doesn’t specifically address thick concepts in this article, but does address the meta-ethical literature on the fact-value distinction and notes the parallels between the ethical and legal discussions of objectivity.

Brian Leiter and Jules L. Coleman replied to Putnam’s article (they also did not use the terminology ‘thick’ or ‘thin’) and their discussions offer interesting insights into the connections between the cognitivist and non-cognitivist literature and philosophy of law. See: Brian Leiter, ‘The Middle Way’ (1995) 1 *Legal Theory* 21 and Jules L. Coleman, ‘Truth and Objectivity in Law’ (1995) 1 (1) *Legal Theory* 33.

Putnam replies to these challenges in: Hilary Putnam, ‘Replies’ (1995) 1 *Legal Theory* 69.

⁴⁶³ These philosophical concerns are wide-ranging and include some of the following: the nature of truth and knowledge in the legal context; the relationship between facts and values; the nature of obligations (legal) and the enforcement of law; the nature of justice; and the nature of normativity. All of which are further complicated by our legal language practices and the interpretive nature of social practices such as law. Many of these core philosophical concerns are central to other disciplines as well (such as ethics), which is one of the many reasons why a close connection between law and morality has often been asserted.

⁴⁶⁴ R. A. Duff, ‘Law, Language and Community: Some Preconditions of Criminal Liability’ (1998) 18 *Oxford Journal of Legal Studies* 189; discusses thick concepts in relation to legal language. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011); Heidi Li Feldman, ‘Appellate Adjudication as Conceptual Engineering’ in Graham Hubbs & Douglas Lind (eds), *Pragmatism, Law and Language* (Routledge, 2014); Heidi Li Feldman, ‘The Distinctiveness of Appellate Adjudication’ (2012) 5 *Washington University Jurisprudence Review* 61; J. E. Penner, ‘Common Law Cognition and Judicial Appointment’ (2001) 38 *Alberta Law Review* 683; all discuss thick concepts in relation to aspects concerning the judiciary, such as: judicial agreement and disagreement; judicial interpretation, judicial knowledge and judicial appointment.

Thick concepts have arisen in the following theorists’ discussions of legal objectivity and the fact-value distinction in law, see: Heidi Li Feldman, ‘Objectivity in Legal Judgment’ (1994) 92 (5) *Michigan Law Review*; Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1992); Amy L. Peikoff, ‘The Right to Privacy: Contemporary Reductionists and their Critics’ (2013) 5 *Washington University Jurisprudence Review* 61; Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Henry Mather, ‘Natural Law and Right Answers’ (1993) 38 *American Journal of Jurisprudence* 297, 313; Simon Hope, ‘The Basic Goods and the “Lawlike” Use of Reason: Comments on *Human Rights and the Common Good*’ (2013) 8 *Jerusalem Review of Legal Studies* 136; John Finnis, ‘A Response to Harel, Hope, and Schwartz’ (2013) 8 *Jerusalem Review of Legal Studies* 147; John Finnis, *Human Rights and the Common Good: Collected Essays volume III* (Oxford University Press, 2011); John Finnis, *Reason in Action: Collected Essays Volume I* (Oxford University Press, 2011); Lawrence B. Solum & Linghao

The chapter identifies, emphasises and builds on the usefulness perceived for thick and thin by these writers. Sections two and three will thus discuss jurisprudential matters pertaining to the judiciary, addressing such apparently diverse topics such as judicial disagreement and agreement; judicial interpretation; judicial engineering of legal concepts; judicial knowledge (including legal expertise); and appointment of the judiciary. In turn, section four will discuss jurisprudential matters pertaining to legal objectivity this will include challenges to the traditional (empirical) notion of legal objectivity and the fact-value distinction.⁴⁶⁵ The jurisprudential debates canvassed through these sections often overlap with many of the legal theorists concerned addressing multiple jurisprudential issues – the breadth of these points of focus serves to emphasise the usefulness I argue for. Section five provides an example of the sweep and range of the approach I support, in which the aim is to demonstrate the usefulness of thick and thin in reviving classical theories of law – such as virtue jurisprudence.

What follows in this chapter is an exposition of the current deployment of thick and thin concepts to these shared core philosophical concerns; it is not a literature review but it will continue to collate the many disparate uses of thick and thin concepts within the legal literature (the task that I started in chapter five) and will therefore be fairly descriptive. This description is necessary to demonstrate the extent of the research required in my investigation into the current use and usefulness of thick and thin concepts within law, which begins to establish a compendium of thick and thin concepts within law. This chapter continues to add to my observations regarding a lack of clarity in the legal literature on thick and thin (see chapter five), reference will be made within both the footnotes and main text regarding specific theorists understanding and appreciation of the meta-ethical literature on thick and thin concepts. The applications of thick and thin concepts drawn on here have been chosen for their ability to demonstrate the usefulness of thick and thin concepts for key jurisprudential debates, not on the basis of their contributions to their chosen topic areas (although it is interesting to note that all of the legal scholars and their contributions have been recognized as important). So this chapter is consistent with the previous two in showing the use and usefulness of thick and thin concepts within

Wang, 'Confucian Virtue Jurisprudence' in Amalia Amaya & Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing, 2013)

⁴⁶⁵ This chapter is not an exhaustive discussion of these jurisprudential debates the aim is to focus on those theorists who have used thick and thin concepts to illuminate these issues, and demonstrate the usefulness of thickness and thinness for jurisprudence.

law (the particular aspect of law addressed in this chapter is jurisprudential debates). Whilst the acceptance that certain legal concepts (such as LEGAL VALIDITY) can be construed thickly will not by itself solve jurisprudential debates within law (such as those addressed in this chapter), it may reframe existing ideas and facilitate new ideas by placing the discussion within the wider philosophical context of thickness and thinness. Enoch and Toh note: ‘Admittedly, a part of what we are doing here is to reframe old questions. But, as we hope our discussion shows, such reframing has theoretical payoffs.’⁴⁶⁶ The following chapter will show how this wider philosophical context could be extended to education, particularly legal education.

2 – The Judiciary.

This section discusses various matters pertaining to the judiciary that can be illuminated by a reframing of the terms of the debate, using the language employed by philosophers, of thickness and thinness. The judiciary has an important role to play in shaping the legal system and future laws and it does this, *inter alia*, through its use of legal language. Legal language notes Duff, is ‘the language of legal professionals – most obviously of judges and lawyers. It is a language in which they, at least, are at home. They can not only understand it, as one might understand what is being said in a foreign language: they can *use* it to express the kinds of judgment and argument which belong to it.’⁴⁶⁷ Legal language is both factual and normative (as demonstrated by the previous two chapters); therefore an understanding of legal language must entail an understanding of both its factual and normative aspects.⁴⁶⁸ The judiciary (and other legal professionals) are trained in legal language unlike ordinary citizens, yet both groups seem to be able to operate with legal concepts and understand the legal obligations and responsibilities placed on them. Duff argues that this is possible

⁴⁶⁶ David Enoch and Kevin Toh, ‘Legal as a Thick Concept’ in Wil Waluchow & Stefan Sciaraffa (eds), *Philosophical Foundations of The Nature of Law* (Oxford University Press, 2013)

⁴⁶⁷ R. A. Duff, ‘Law, Language and Community: Some Preconditions of Criminal Liability’ (1998) 18 *Oxford Journal of Legal Studies* 189, 198. This section focuses on the use of legal language by the judiciary; but it is important to note that the lay participants in the legal trial (and legal system) must also be able to understand enough of legal language to play their parts. Sometimes a translation from a legal professional (judge, counsel or magistrates clerk) may be required.

⁴⁶⁸ Duff provides the example of a defendant in a criminal trial: ‘the defendant must be able to understand the values that underpin the claim that their alleged conduct constituted a criminal *wrongdoing*. Second, the defendant’s understanding of legal language must be sufficient to enable the defendant to make ‘first personal, committed normative statements which express her own acceptance of the law and its values.’ Ibid at 199. Grasping legal language in this way is an essential condition of criminal responsibility and precondition of criminal liability.

because thick legal concepts provide a bridge between legal language and extra-legal language:

Of course the law will give partly technical meanings to concepts which it takes over from extra-legal language – to enable those concepts to serve the particular roles that they fill in the special context of the law. But there must be a bridge, a bridge which is neither too long nor too far, which can take ordinary citizens from ordinary language into enough of the language of the law for them to be able to speak the relevant parts of that language in the first person.⁴⁶⁹

These thick legal concepts,

are sufficiently closely connected to their extra-legal forms for citizens, defendants and jurors to grasp as much of them as they need (if necessary with some judicial assistance); and the language of the law thus clearly is a language which lay citizens can speak, as much as they need to and when they need to.⁴⁷⁰

The relationship between thick legal concepts and extra-legal language is important in explaining how we understand legal language and why this understanding sometimes leads to disagreement. Williams notes a similar connection between legal language and its non-legal counterparts and argues that philosophy (as well as law) can learn from legal concept use.⁴⁷¹ Jay Connison identifies PROMISE and PROMISING as examples of thick concepts and distinguishes between the everyday concept PROMISE and the legal concept PROMISE which often forms the basis of legal obligations, particularly within contract law.⁴⁷² Heidi Feldman cites NEGLIGENCE and its sister concepts REASONABLE PERSON and UNREASONABLE RISK as examples:

NEGLECT and its sister concepts are examples of blend concepts that appear in non-legal discourse and then receive conscious cultivation from legal specialists, including courts, lawyers, and legal scholars. The cultivated terms of art responds to the needs and

⁴⁶⁹ *ibid* at 200

⁴⁷⁰ *ibid* at 201

⁴⁷¹ Bernard Williams, 'Afterword What Has Philosophy to Learn from Tort Law?' in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University press, 1995). For an explanation of Williams' argument see my earlier discussion of this article in chapter five.

⁴⁷² Jay Connison, 'The Pragmatics of Promise' (1997) 10 *Canadian Journal of Law & Jurisprudence* 273, 312

interests that inform negligence in a more refined and powerful way than does its uncultivated ordinary language counterpart.⁴⁷³

Technical legal language (thick legal concepts) cannot become excessively esoteric or technical because these terms still need to be intelligible to the lay people, especially those involved in the legal system such as jurors. Feldman argues that ‘while legal mechanisms constrain jury judgments of negligence, social facts about reasonable behaviour and risk constrain legal development of *negligence* and its subsidiary concepts.’⁴⁷⁴ For example the REASONABLE PERSON is an idealised notion, but it is still based on a composite of the community and therefore is constrained by social facts.

These discussions of thick legal concepts are important for legal agreement and disagreement, because it demonstrates that a certain level of agreement in both the factual and normative elements of legal language, or as Wittgenstein put it: agreement ‘in form of life’ is necessary.⁴⁷⁵ There are many different kinds of agreements and disagreements, but this chapter is concerned with legal disagreement amongst the judiciary, because this seems to have important implications for legal objectivity and the legitimacy of the legal system.

Legal Agreement and Disagreement.

Ronald Dworkin has been one of the most significant contributors to the debate on legal disagreement in jurisprudence, so it is of particular relevance to my thesis that his latest work draws on the philosophical distinction between thick and thin concepts.⁴⁷⁶

⁴⁷³ Heidi Li Feldman, ‘Objectivity in Legal Judgment’ (1994) 92 (5) *Michigan Law Review* 1187, 1210 – 1211

⁴⁷⁴ *ibid* at 1233

⁴⁷⁵ Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 3rd edition, G. E. M. Anscombe (trans.), 1953-1958), para 241

⁴⁷⁶ His views have developed throughout the following books: Ronald Dworkin, ‘Hard Cases’ reprinted in *Taking Rights Seriously* (Harvard University Press, 1977); Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1986); Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986); Ronald Dworkin, *Taking Rights Seriously* (Duckworth, new impression with a Reply to Critics, 2005); and Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006). This chapter focuses on his latest work: Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011)

For useful further reading on Dworkin’s ideas and their impact on jurisprudence, see: Justine Burley (ed), *Dworkin and His Critics* (Blackwell, 2004); Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1984); Stephen Guest, *Ronald Dworkin* (Edinburgh University Press, Edinburgh, 2nd edition, 1997); Scott Herschovitz (ed), *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006); Brian Leiter, ‘The End of Empire: Dworkin and Jurisprudence in the 21st Century’ (2004) 36 *Rutgers Law Journal* 165; Andrei Marmor,

Dworkin's discussion of thick concepts whilst succinct recognises many of the key issues addressed by the meta-ethical literature on thick concepts. He acknowledges the wide variety of approaches to the distinction and the tendency of some philosophers to over exaggerate its importance whilst others underestimate it. In *Justice for Hedgehogs*⁴⁷⁷ Dworkin distinguishes between various types of concepts as part of his explanation of legal agreement and disagreement.⁴⁷⁸ Part of the judges role in deciding a case involves interpreting legal concepts (hence the chapter title: conceptual interpretation). Many legal theorists have used Gaillie's notion of essentially contested concepts to explain legal disagreement.⁴⁷⁹ Dworkin takes an alternative approach. He argues that many moral and political concepts are interpretive: 'we share an interpretive concept when our collective behavior in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us.'⁴⁸⁰ Interpretive concepts are subject to agreement and disagreement when applied to specific cases but we can explain this agreement and disagreement not on the basis of shared criteria for application, but by supposing that there are shared practices that these concepts figure in.⁴⁸¹ Our 'abstract moral concepts' (thin concepts) seem to require a different account of interpretation because in these instances Dworkin argues that we are interpreting 'an open-ended and large set of practices rather than a smaller and more focused practice.'⁴⁸² This aspect of Dworkin's account ties in with the earlier accounts of thick and thin that were based on a distinction between specific (thick) and more general (thin) concepts and descriptions.⁴⁸³

Interpretation and Legal Theory (Clarendon Press, 1992); Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press, 2007); Scott Shapiro, 'The Hart-Dworkin debate: a guide for the perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press, 2007); and Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press, 1996)

⁴⁷⁷ Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011)

⁴⁷⁸ He distinguishes between 'interpretive' concepts, 'criterial' concepts, and 'natural kind' concepts. I address only interpretive concepts because he categorises both thick and thin concepts as a way of distinguishing between different types of interpretive concept.

⁴⁷⁹ W. B. Gallie 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167. See chapter two for my earlier discussion of essentially contested concepts, where I note Hurley's relevant work on centralism and non-centralism, see: Susan Hurley, *Natural Reasons Personality and Polity* (Oxford University Press, 1992)

⁴⁸⁰ see note 477 at 158

⁴⁸¹ *ibid*

If there was a shared criteria of application that was unanimously agreed upon (as in the case of criterial concepts) then disagreement would seem to be illusory about its proper use in some circumstances.

⁴⁸² *ibid* 181

⁴⁸³ See Hurley on concepts: Susan Hurley, *Natural Reasons Personality and Polity* (Oxford University Press, 1992); and Ryle on descriptions: Gilbert Ryle, 'The Thinking of Thoughts: What is 'Le Penseur' Doing?' in *Collected Essays 1929-1968* (Routledge, 2009)

Dworkin (like all the legal theorists I have addressed in the previous two chapters) draws on Williams' distinction between thick and thin concepts, writing: '... thin concepts, because they are very abstract vehicles of commendation or disparagement that can be attached to an almost unlimited range of actions or states of affairs. We can intelligibly say, of almost any human action, that it is morally required or wrong.'⁴⁸⁴ These more general (abstract) concepts leave more room for interpretation because they contain less descriptive (world-guided content), whereas the more specific (thick concepts),

mix the praise or disparagement they offer with more concrete factual descriptions. "Brave," "generous," "cruel," and "trustworthy" are thick concepts: each of these praises or condemns a particular kind of behavior that it also describes. So each of the thick concepts can sensibly be applied only to a certain kind of act, an act, we might say, that is a candidate for that particular kind of commendation or condemnation.⁴⁸⁵

There is less room for interpretation and disagreement regarding thick concepts, because they are more closely connected to the way the world is (world-guided content) and contain more detailed descriptive content.⁴⁸⁶ Williams asserts a similar claim in *Ethics and the Limits of Philosophy*: he argues that thick concepts are more likely to lead to ethical knowledge or ethical confidence, because of their world-guided content.⁴⁸⁷ Dworkin never explicitly discusses this particular aspect of thick concepts – their ability to act as a vehicle for legal knowledge – although it is implied through his account of conceptual interpretation that judicial knowledge is still possible via the interpretation and application of thick legal concepts.

Dworkin's terminology differs from Williams, but both assert the importance of action-guidance; Dworkin asserts the role of an underlying normative judgment (commendation or condemnation) in thick concept application. Unlike many legal theorists he addresses conceptual priority and advances a no-priority view on the

⁴⁸⁴ see note 477 at 181

⁴⁸⁵ *ibid*

⁴⁸⁶ At the moment though this is all suppositional, to really understand whether it is thick legal concepts or thin legal concepts that seem to be the cause of legal disagreement an investigation into the nature of legal concepts that feature frequently in judicial disagreement would be needed. My thesis cannot permit such an investigation, but for those legal theorists interested in legal disagreement this could be a useful research opportunity and may also benefit the philosophical literature on thick and thin.

⁴⁸⁷ See my earlier discussion in chapter four of Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge Classics, 2011)

grounds that both concrete (thick) and abstract (thin) concepts have roles to play in our moral repertoire.⁴⁸⁸ Dworkin opines:

On some occasions idiom or practice or context makes it more natural to say that an act is just plain wrong than that it is treacherous, inconsiderate, cruel, dishonest.... On other occasions the more concrete charges or claims would seem more natural. In either case, more concrete or more abstract judgments are waiting in the wings, though they never appear.⁴⁸⁹

Dworkin's no-priority view ties in neatly with the flexibility of thickness provided by a difference of degree and is useful for understanding judicial decisions.⁴⁹⁰ Evaluative flexibility allows judges a degree of flexibility in their judgments: to distinguish overall judgments from pro tanto considerations (for example his actions were cruel but in that particular case at that particular time they were the right thing to do); and to use thinner concepts to state final conclusions in hard cases or evenly balanced cases. Dworkin concludes that thin concepts, despite being abstract, still function as interpretive concepts and that our disagreement over their application is evidence of this:

But the interpretation they require must be focused, at least in the first instance, on other concepts, because the thinner concepts draw conclusions but do not themselves suggest much by way of argument. When argument is needed, we interpret the thicker concepts, including the relatively thinner of those thicker concepts, like the ideas of what is reasonable and what is just, to find grounds for redeeming the less clothed conclusions we offer in the very thin concepts we use first.⁴⁹¹

Dworkin's conclusion responds to those critics who have argued that thin concepts (and therefore the distinction between thin and thick concepts as well) threaten his interpretive understanding of morality and moral concepts. Dworkin's inclusion and use of thick and thin concepts in his latest book - demonstrates the relevance and importance of thick and thin concepts for law, it is also an interesting reflection of how Dworkin's ideas have developed over the course of his academic career. His seminal

⁴⁸⁸ The issue of conceptual priority is rarely discussed in the legal literature on thick and thin and even within the meta-ethical literature no-priority views have only recently been expressed. For example Simon Kirchin suggests a no-priority view of thick ethical concepts in his forthcoming monograph on thick evaluative concepts.

⁴⁸⁹ see note 477 at 183

⁴⁹⁰ Again Dworkin's account is one of the few legal accounts of thick and thin to address the two related topics from the philosophical literature: difference of degree and evaluative flexibility.

⁴⁹¹ *ibid* at 184

status within jurisprudence and his inclusion of these ideas thereby appears to add further credence to my thesis (which advances the usefulness of these ideas within law). Dworkin's work acknowledges many aspects of the meta-ethical literature on thick and thin concepts that are missed by other legal theorists working with thick and thin concepts (in chapter five I noted that many legal theorists working with these terms misunderstood many aspects of the meta-ethical literature on thick and thin concepts, and cited Dworkin as a notable exception), but his work (like much of the legal literature) would still benefit from a more detailed analysis of these ideas, because as noted earlier in chapter five the legal literature on thick and thin concepts lacks clarity. Dworkin's work on thick concepts supports my earlier argument (chapter five) that despite the current weaknesses with the legal deployment of thick and thin concepts, the distinction is still useful within law and sharpening their future application will add value to their utility. The area of law that Dworkin applies these ideas to – legal disagreement – is a crucial aspect of any legal curriculum, and if thickness and thinness can be helpful for Dworkin in explaining the nature of judicial interpretation and disagreement then this suggests that they could be useful for legal education in explaining legal disagreement.

'Re-engineering' Legal Concepts.

Conceptual interpretation alters a concept slightly (the concept users interpretation will always be unique to them) but this may be unintentional and subconscious, and it may not even be noticeable to an observer. Sometimes these interpretations maybe more like manipulations and in these instances the concept will be interpreted in a manner that fits the concept users purpose (often to convince someone else to agree with them). Thick concepts like purely evaluative concepts can be the ideal vehicle for this kind of interpretive practice and investigating thick concepts within law can be useful for law as a way of investigating and potentially explaining how legal concepts seem to alter and develop overtime.

Heidi Feldman is an example of a legal theorist who has suggested that legal concepts can be re-interpreted in an evaluatively driven manner (she refers to this as re-engineering). She continues Dworkin's discussion of legal agreement and disagreement, but uses the term 'entangled' legal concepts rather than 'thick' legal

concepts.⁴⁹² Due to the similarity between her notion of ‘entangled’ or ‘blend’ concepts and ‘thick’ concepts my investigation proceeds on the basis that her arguments are also applicable to thick concepts.⁴⁹³ Feldman takes her discussion further than Dworkin in two ways: she asserts the evaluative flexibility of certain legal concepts (thick concepts), and argues that judges not only interpret these concepts but re-engineer these entangled (thick) concepts, the judiciary therefore play a part in shaping the evaluative nature of these legal concepts (which in turn shapes the law). Feldman argues that the nature of ‘entangled’ legal concepts can lead to judicial disagreement because of their evaluative flexibility, but that this evaluative flexibility can also be used by judges to ‘re-engineer’ these concepts into more ‘appropriate’ legal concepts.⁴⁹⁴ Judicial discretion and interpretation is an already controversial aspect of judicial behavior, the idea of ‘re-engineering’ entangled concepts explicitly acknowledges that the judiciary have an active (rather than passive) role in developing the common law, which can be controversial.

Feldman argues that ‘the courts engineer entangled legal concepts via appellate adjudication, and it is in this respect appellate adjudication is both crucial and unique at least in the U.S. legal system.’⁴⁹⁵ The merger of fact and value in entangled concepts explains both judicial disagreement and the constraints that are placed on judges when

⁴⁹² Feldman states: ‘Entangled concepts intertwine description and evaluation. They also facilitate and constrain legal reasoning and legal judgments, in ways that distinguish legal adjudication from pure politics or the implementation of public policy.’ Heidi Li Feldman, ‘The Distinctiveness of Appellate Adjudication’ (2012) 5 *Washington University Jurisprudence Review* 61. They are very similar to thick concepts and draw clear parallels from the separationist and non-separationist debate regarding entanglement in thick and thin concepts. Feldman makes it clear in her first footnote that she is utilizing Hilary Putnam’s term ‘entangled concept’ to refer to concepts that resist deduction to discrete descriptive (fact) and evaluative (value) components. See: Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, 2004). Feldman has also used the term ‘Blend Concept’ to refer to the same conceptual phenomena in her work that predated Putnam’s terminology. see note 498

⁴⁹³ Feldman has written numerous articles concerning concepts which combine evaluation and description in some manner (as evidenced by my references), although these may not specifically address thick concepts her work offers one of the most detailed accounts of the relevant meta-ethical literature and demonstrates a sharp and nuanced understanding of the nature of these terms.

⁴⁹⁴ There are a number of ways ‘appropriate’ could be interpreted, but I am using it to refer to an evaluation made by the judge (for whatever reasons) that this version (re-engineered) of the entangled concept is a better legal concept given the circumstances.

⁴⁹⁵ Heidi Li Feldman, ‘The Distinctiveness of Appellate Adjudication’ (2012) 5 *Washington University Jurisprudence Review* 61. Her claims are specifically targeted at the appellate courts in the U.S. but many of her ideas are relevant and useful to an analysis of the English court hierarchy and appeals process. English common law dictates that the lower courts follow precedents set by the higher courts, and these legal precedents involve elements of judicial discretion and judicial interpretation that could be (at least partially) explained by engineering entangled legal concepts.

deciding cases.⁴⁹⁶ Feldman elaborates: ‘In entangled concepts, the descriptive and the evaluative are fundamentally interrelated such that when one aspect is reshaped so is the other. This provides a check on the malleability of legal concepts: insofar as one does not wish to disturb the evaluative point of a concept, one cannot unthinkingly modify its descriptive reach, and vice versa.’⁴⁹⁷ Thinking of legal concepts that are often at the centre of legal disagreement as *thick* concepts or *entangled* concepts can be useful in understanding the nature of legal disagreement and judicial conceptual interpretation; because these concepts acknowledge that evaluative content is present and many theorists (like Feldman and I suspect Dworkin) allow for a degree of flexibility in the construal of the evaluative aspects of the concept.⁴⁹⁸

Explicitly acknowledging the role of the judiciary in re-engineering legal concepts may raise concerns over the amount of discretion and unfettered power they have. Feldman pre-empts this concern: ‘In entangled legal concepts, the descriptive and the evaluative check and balance one another. However, entanglement does allow for the modification or reengineering of entangled legal concepts.’⁴⁹⁹ The idea of checks and balances of course has a long history in the judiciary as a way of limiting abuses of power, but this may only be sufficient to satisfy the concerns of some theorists.⁵⁰⁰ The evaluative and descriptive aspects in her entangled concepts are related in a manner indicative of non-separationism, although there is no reference to the shapelessness hypothesis (see chapter three). Rather the hypothesis seems to be implied by her claim

⁴⁹⁶ Williams notes these constraints and the pressure exerted on concepts by the legal system see note 471

⁴⁹⁷ Feldman does not define the extent to which a concept can be re-engineered and its evaluative point remain undisturbed; but there must be a limit, because at some point the concept is no longer re-engineered it is an entirely new concept. The same principle applies to many of our thin concepts (or purely evaluative concepts depending on how you draw the distinction between thick and thin concepts) and is not something that can be addressed in this thesis. see note 495 at 63

⁴⁹⁸ In a lengthy footnote Feldman demonstrates the close parallel between her ‘entangled concept’s and thick concepts. Feldman charts the contemporary philosophical discussion of concepts that blend description and evaluation; she references the influence of Philippa Foot and G.E.M. Anscombe’s challenges to the strict separation of description and evaluation, on Williams’ development of thick ethical concepts. See: G. E. M. Anscombe, ‘Modern Moral Philosophy’ (1958) 33 (124) *Philosophy* 1; G. E. M. Anscombe, ‘On Brute Facts’ (1958) 18 *Analysis* 69; and Philippa Foot, ‘Moral beliefs’ (1958) 59 *Proceedings of the Aristotelian Society* 83. Post Williams’ *Ethics and the Limits of Philosophy* she references the work of philosophers such as Peter Railton, Allan Gibbard and Simon Blackburn on thick concepts. See: Peter Railton, ‘Red, Bitter, Good’ in *Fact, Values and Norms: Essays towards a morality of consequence*, (Cambridge University Press, 2003), 131-47; Allan Gibbard and Simon Blackburn, ‘Morality and Thick Concepts’ (1992) 66 *Proceedings of the Aristotelian Society* 267

⁴⁹⁹ see note 495

⁵⁰⁰ Consider for example the separation of powers within the English system of governance (legal and political), this acts as a check and balance against abuses of power.

that the evaluative and descriptive aspects are entangled to such an extent that they cannot be understood separately.⁵⁰¹ Feldman states:

As circumstances and values change, appellate courts can put these changes to work to redesign an entangled concept that has become outmoded. If the concepts' evaluative point is obsolete, this will drive a modification in its descriptive reach that responds to a revised understanding of the relevant values. Likewise, if the descriptive reach of the concept no longer serves its evaluative point, courts can update the concept's situational range. In either case, though, the aspect of the concept undergoing revision must answer to the other aspect: the descriptive and evaluative cannot be understood or engineered independently of one another.⁵⁰²

Re-engineering of entangled concepts must always be in line with the evaluative standpoint of the legal practice (and the wider social community it is located within), but it will not always be the intended result of a judge's actions or decisions. Sometimes entangled concepts can be intentionally reengineered to reflect changes in the social morality of a community (shared evaluations of the practice), these conceptual interpretations involve conscious concept manipulation. More subtle changes in the evaluative standpoint of a community can sub-consciously impact the judicial application of concepts, in these instances the judge may unintentionally reengineer the entangled concept in line with the altered evaluative standpoint.

Feldman's argument specifically addresses Appellate judges because she argues that 'no other legal actor effects change at such a foundational level and on such a routine and ongoing basis.'⁵⁰³ Legislatures can also make sweeping structural changes but legislative law is 'overtly political and stipulative'⁵⁰⁴ it is not answerable to a conceptual scheme in the same way that the judiciary are. She distinguishes appellate courts from other lawmakers: 'Appellate courts shape the law differently. They work concept by concept, and must answer to the constraints imposed by the entangled concepts themselves.'⁵⁰⁵ It is for this reason that thick concepts can be so useful (and important) in understanding our legal practices, in particular those of the judiciary.

⁵⁰¹ Feldman's non-separationism is reflective of both Putnam's challenge to the fact-value distinction and Williams' challenge against the prescriptivist account of concepts (she notes the influence of both of these theorists in her work).

⁵⁰² see note 495 at 63

⁵⁰³ *ibid* at 66

⁵⁰⁴ *ibid*

⁵⁰⁵ *ibid* at 67

Feldman cites the example of the thick legal concept COMMERCE which has been re-engineered throughout a series of cases, focusing particularly on the most recent Supreme Court case: *National Federation of Independent Business v. Sebelius*.⁵⁰⁶ The decision in this case was not unanimous therefore from a precedential perspective this case provides two rival engineering efforts rather than one definitive engineering of COMMERCE.⁵⁰⁷ Feldman discusses the various competing interpretations of the thick concept to demonstrate that the term ‘commerce’ is: ‘too fraught with competing views of the relevant factual-evaluative considerations for that concept to lend itself to an agreed-upon engineering.’⁵⁰⁸ From her discussion of appellate conceptual engineering she concludes that appellate cases, such as *National Federation*, teach us something important about thick concepts: ‘they come in sets or clusters. When one concept cannot be engineered to garner sufficient judicial endorsement, this can pave the way for another entangled concept to come into play, a concept that at first may not have seemed to be important to deciding a case.’⁵⁰⁹ In this particular case COMMERCE lent itself to being engineered in radically different ways because the judiciary understood the ‘mesh of fact and value’⁵¹⁰ within the concept differently, as a result the concept got sidelined and the thick concept TAX was engineered. Feldman concludes that her analysis of *National Federation* demonstrates the U.S. courts (both the state appellate courts and the Supreme Court) recognise and utilise the entanglement of facts and values within thick legal concepts when engineering legal concepts: ‘sensitivity to and engagement with entanglement to achieve practicable legal concepts is the hallmark of appellate adjudication in the United States, whether the adjudication concerns constitutional law or common law.’⁵¹¹

Shyamkrishna Balganesesh agrees with Feldman’s argument concerning both the usefulness of thick concepts within legal cases and the engineering of thick concepts

Her argument could be extended to other members of the judiciary but there will be a direct relation between the judicial hierarchy and the extent of reengineering that occurs. For example lawyers will indirectly influence the reengineering of entangled concepts because their conceptual behaviour in the courtroom will impact on those judges with the ability to reengineer concepts.

⁵⁰⁶ *National Federation of Independent Business v. Sebelius* (2012) 132 S. Ct. 2566

It is important to note that Feldman uses this example because it demonstrates the link between appellate engineering of thick legal concepts and the legislature as this case concerned the thick concept COMMERCE as defined by the Patient Protection and Affordable Care Act 2010.

⁵⁰⁷ see note 495 at 100

⁵⁰⁸ *ibid* at 103

⁵⁰⁹ *ibid*

⁵¹⁰ *ibid*

⁵¹¹ *ibid* at 104

within legal cases, he cites the example of the thick concept CONSIDERATION as utilised by Chief Justice Cardozo in *Allegheny College v. National Chautauqua County Bank*.⁵¹² This case is normally understood as involving the doctrine of promissory estoppel and its relationship to contract laws requirement for consideration within contracts.⁵¹³ Cardozo manipulates the thick concept CONSIDERATION in a process of incremental doctrinal change. Cardozo within his judgment extols the malleability of thick legal concepts in the common law, whilst remaining “distinctive” within the doctrinal apparatus of law:

Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. The concept survives as one of the distinctive features of our legal system.⁵¹⁴

Balganesh argues that whilst thick concepts are malleable and can be flexibly applied their meaning is stable. He uses the example of another thick concept from contract law - GOOD FAITH - the core jural meaning of this thick concept is understood or defined in the same way by all judges and explains judicial ability to distinguish between GOOD FAITH and other obligatory thick concepts, such as REASONABLENESS in torts.⁵¹⁵ He argues that thick legal concepts despite their:

normative open-endedness when applied to specific situations signals to judges and actors that the disagreement (if any) in application is to be limited to certain specific criteria. The identification of such criteria enables the jural meaning of the legal concept to feed into a community’s shared understandings and linguistic conventions, despite the overall ethical and evaluative nature of the legal concept. A concept’s thickness, in other words, contributes directly to the stability of the concept’s meaning, even in the face of differential application.⁵¹⁶

Balganesh argues that it is these two features of thick concepts – the stable jural meaning and the flexible normative meaning – imbued within thick common law

⁵¹² *Allegheny College v. National Chautauqua County Bank* (1927) 159 N. E. 173

⁵¹³ Shyamkrishna Balganesh and Gideon Parchomovsky, ‘Structure and value in the common law’ (2015) 163 (5) *University of Pennsylvania Law Review* 1241

Chapter eight (legal education) returns to the issue of re-engineering thick concepts and an example case cited by Feldman is noted here.

⁵¹⁴ see note 512 at 175

⁵¹⁵ see note 513 at 1273

⁵¹⁶ *ibid* at 1272-1273

concepts that creates an important equilibrium. ‘This equilibrium allows the common law to guide behaviour, promote reliance, and ground decisionmaking, while at the same time remaining open and receptive to competing normative theories and values.’⁵¹⁷ The robust nature of this equilibrium explains the endurance of the common law’s core architecture of concepts, many of which are thick concepts.

When we consider ordinary concept use (especially in the context of an argument) it seems fairly reasonable to accept that our use of certain concepts will be interpretive and that this interpretation may alter slightly (re-engineer) that concept to better fit the nature of our argument. Many of our most passionate arguments (such as ethical ones) operate this way. Our language is constantly evolving - new words are developed and old words fall out of use – and our concepts evolve in many ways. This evolution is partly driven by both our conscious and subconscious manipulation of concepts through their use. When these aspects of our ordinary conceptual practices are noted it seems odd to think that law would be excluded from this. The engineering of entangled concepts by the judiciary is a reflection and extension of our ordinary conceptual behaviour and practices (albeit with more limitations placed upon it). Thick (entangled) and thin concepts are useful here because they capture the flexibility of our legal concepts and articulate how such concepts can be manipulated. The picture that emerges is therefore consistent with Williams’ argument (addressed at the end of chapter five) that philosophers could learn from law about the nature of thick concepts, because legal arguments (and judgments) place additional pressures on concepts.⁵¹⁸ This additional pressure places additional requirements on the judiciary in terms of their knowledge and expertise, the legal literature on thick and thin has recognised this and in chapter eight (legal education) I note the importance of teaching competency with thick and thin legal concepts and hence the relevance of these terms for legal education.

Feldman argues that understanding the specific entanglement in a particular legal concept requires a tremendous amount of background knowledge (cultural, historical, sociological, anthropological, and psychological) and that engineering entanglement also requires this level of knowledge. Such a widespread knowledge base could take years to develop and although we do not need a ‘true’ account of thick and thin

⁵¹⁷ *ibid* at 1273

⁵¹⁸ see note 471

concepts to develop this kind of knowledge, it does challenge jurists to re-think many other jurisprudential issues associated with the judiciary. For example: does the existence of thick and thin concepts within our legal system and their use by the judiciary, require any additional knowledge or expertise; and if so does this have implications for the kinds of people that should be appointed to the judiciary? This question has started to receive attention from legal theorists writing on thick and thin concepts, so I turn to this literature now.

3 – Legal Knowledge.

Accepting the notion of entangled concepts and the picture above of both judicial conceptual practices (choosing to evaluate and describe in one particular way, rather than another) and the conceptual behavior of lawyers in the courtroom as sometimes reengineering these entangled concepts; has implications for the kind of individuals we wish to be appointed to the judiciary. If our legal concepts are not simply descriptions of legal facts then this places additional knowledge requirements on the judiciary (the same could be argued as applying to any legal practitioner).

Judicial Appointment.

In *Common Law Cognition and Judicial Appointment*⁵¹⁹ James Penner offers a similar discussion to Dworkin and Feldman, but uses the term ‘basic moral concepts.’⁵²⁰ Penner argues that the common law ‘remains wedded by necessity to exploring the guidance provided by an irreducibly plural set of basic moral concepts.’⁵²¹ These ‘basic moral concepts’ both influence judicial decisions and are themselves shaped by judicial decisions (the same point is applicable to entangled legal concepts and thick or thin legal concepts). In a later piece *Legal Reasoning and the Authority of Law*⁵²² Penner explores ‘the legitimacy of the authority of judge-made law from the

⁵¹⁹ J. E. Penner, ‘Common Law Cognition and Judicial Appointment’, (2001) 38 *Alberta Law Review* 683

⁵²⁰ In this article Penner discusses Williams on thick ethical concepts and the ‘basic moral concepts’ that he refers to are related to Williams’ thick ethical concepts, which Penner treats as ‘descriptive and evaluative wholes.’ *ibid*

⁵²¹ *ibid* at 700

⁵²² J. E. Penner, ‘Legal reasoning and the authority of law’ in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003)

perspective that common law judges and lawyers legitimately possess authority generated by their having a kind of expertise.⁵²³ The kind of expertise Penner wishes to propose that common law judges and lawyers demonstrate is moral expertise (they quite clearly have legal expertise: this is not in question). The literature on thick concepts could explain this phenomenon of moral expertise as it has done in ethics, and thus explain how judges seem to demonstrate a kind of moral expertise through their use of thick legal concepts.⁵²⁴

Given the prevalence of thick evaluative concepts in practical judgments, it may be worthwhile to consider whether it is the thick rather than the thin concepts that are the basis of normative or evaluative judgment. If it is the thick concepts that form the basis of the underlying normative or evaluative judgments in legal cases, then common law lawyerly and judicial expertise may not be equivalent to abstract moral philosophical reasoning, and may be indicative of some kind of superior knowledge or expertise in dealing with thick ethical concepts. This is interesting because Williams actually advances a similar argument in *Ethics and the Limits of Philosophy*⁵²⁵ when he claims that we should focus more on the thick rather than the thin, because it is the thick concepts that are more likely to lead to ethical knowledge or ethical confidence (though this connection is not mentioned in the relevant legal literature).

Penner argues that Raz's account of values paints an attractive picture that could provide the basis for a plausible account in which, common law judges and lawyers possess a kind of moral expertise that endows them with authority.⁵²⁶ Common law development responds to the disputes presented in the court room; judges and lawyers involved in such disputes need to understand the facts of the case and what values and disvalues are instantiated in the case (this includes an understanding of their cultural contingency). This understanding leads to a familiarity with the thick ethical concepts that represent those values and disvalues.

The common law tradition requires the judge to explain their interpretation of the facts and their reasoning for their decision and this requirement for intelligibility is likely to

⁵²³ *ibid* at 73-74

⁵²⁴ Williams argues for a kind of ethical expertise based on thick ethical concepts see chapter 4.

⁵²⁵ *ibid*

⁵²⁶ Joseph Raz, *Engaging Reason* (Oxford University Press, 1999)

involve the use of thin ethical concepts.⁵²⁷ The use of both thick and thin ethical concepts in their reasoning can demonstrate the consistency of their current decision with previous decisions and ensure that no factors of importance that can often only be seen at the more abstract level have been left unconsidered by their judgment. Penner thinks this picture represents the character of legal discourse accurately.⁵²⁸ Penner describes the picture as follows:

It occupies a median level of abstraction. And it also seems to permit the claim that judges and lawyers can have (not always, nor necessarily) the moral expertise which would entitle them to make law. This would lie in both their familiarity in applying thick ethical concepts to often puzzling or complex sets of facts, and in their learned facility in giving voice to the intelligibility of these thick ethical concepts and their application in particular cases by reference to thin ethical concepts, in particular thin ethical concepts which have made their appearance in law as much as moral and political philosophy, thin ethical concepts such as ‘right’ and ‘just’.⁵²⁹

Judges and lawyers demonstrate a kind of moral expertise that is developed through the practice of adjudication, which in turn legitimises their authority to make common law.⁵³⁰ This legitimacy arises due to their ability (developed over time through experience and study) to use conceptual apparatus: ‘a practical familiarity and facility with the battery of concepts and the doctrinal system in which these concepts have been limited and shaped and organized into some more or less coherent body of considerations which may be prayed to in aid to give normative guidance to the subject of the law.’⁵³¹ This conceptual apparatus is closely related (sometimes identical) to moral concepts applicable to the same factual situations, and it is because of this ability they can also be said to demonstrate a kind of moral expertise.⁵³²

⁵²⁷ It is interesting to note that the legal theorists that have been addressed up until this point in this chapter have focused on thick concepts, although my thesis argues for the usefulness of both thick and thin concepts within law, thick concepts play a more prominent role in my investigation and therefore receive more attention.

⁵²⁸ The accuracy of the picture is not in question here, it is the usefulness of the picture that is the focus.

⁵²⁹ see note 522 at 87

⁵³⁰ Penner argues that from Raz’s writings a cognitive explanation can be gleaned for his claim. See: Joseph Raz, *Engaging Reason* (Oxford University Press, 1999); Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, 1994); Joseph Raz, ‘Notes on Value and Objectivity’ in Brian Leiter (ed), *Objectivity in Morality and the Law* (Cambridge University Press, 1999); and Joseph Raz, *Practical Reason and Norms* (Princeton University Press, 2nd edition, 1990)

⁵³¹ see note 519 at 700

⁵³² This is where Raz and Penner depart, Penner admits that whilst attractive, Raz’s position relies on a mistaken assumption – that thick evaluative concepts are parochial concepts, and that thin evaluative concepts are in comparison to the thick more general, less context dependent, capable of subsuming the thick and therefore less parochial. Penner argues contrary to this, and like Williams favours thick

The idea that the judiciary is required to possess expertise in handling thick and thin legal concepts, which then manifests itself as a kind of moral expertise; as already noted has implications for the judicial appointment process. Penner concludes: ‘that it seems sensible, before designing an appointments process, to determine the character of the job to be done by the appointee, and thus the sort of expertise required to undertake the job.’⁵³³ The appointment of judges has implications for both the future content of law and the development of the legal system. The law is in part a reflection of the judiciary (and of many other aspects of the legal system) and to understand the nature of the law requires an understanding of the role the judiciary play in the legal system; therefore thinking about the role of the judiciary and the judicial appointment process is an important aspect of jurisprudence.

Concluding Remarks on the judiciary.

This chapter has so far argued for the usefulness of thick and thin concepts within jurisprudence in matters pertaining to the judiciary, I have focused upon those legal accounts which exhibit a detailed and nuanced understanding of the distinction. None of the legal theorists addressed in this chapter (including Feldman or Penner) assert that all legal concepts are thick concepts (entangled legal concepts or basic moral concepts); it is just that these concepts have been the focus of their discussion because of their ability to enrich our understanding of jurisprudential debates concerning the judiciary. Thick and thin concepts are more prevalent in certain areas of law, so the legal discussion of these terms has tended to focus on only certain areas, such as criminal law,⁵³⁴ but this should not be taken as an indication that the usefulness of these terms within law is limited to the areas currently addressed by the legal literature.⁵³⁵

concepts. Both Penner and Raz incorporate thick and thin concepts into their legal theory in a manner that adds credence to my thesis.

⁵³³ see note 519 at 702

⁵³⁴ Anthony Duff promotes the role of thick ethical concepts in criminal law, he argues that for criminal law to be an accurate representation of the evaluative standpoint of a particular community it must operate through the thick ethical concepts of that particular community. see note 467

⁵³⁵ In the footnotes Duff notes for an interesting discussion of non-fatal offences against the person that implies that these offences may be examples of thick legal concepts see: J. Gardner, ‘Rationality and the Rule of Law Offences against the Person’ (1994) 53 *Cambridge Law Journal* 502; J. Horder, ‘Rethinking Non-Fatal Offences against the Person’ (1994) 14 *Oxford Journal of Legal Studies* 335

It is important to note that none of the legal theorists (or indeed meta-ethicists) addressed in this study deny that these terms are a development of pre-existing ideas within meta-ethics (see chapter two and three), but this does not detract from their value. Returning to Feldman as an example: she never claims that entangled concepts are a recent legal invention or that the role of the judiciary has changed to now include the engineering of entangled concepts, instead she is arguing that our recognition of this feature of our legal system is fairly recent and needs to be acknowledged explicitly.⁵³⁶ The role of thick concepts (entangled legal concepts) in cases and the reengineering of such concepts by the judiciary, indicates that these are terms law students (our future lawyers and judges) need to be familiar with. Acknowledgment of their role in judicial practices requires law school curricula (and legal education more widely) to reflect this through their teaching, especially regarding common law and case-led teaching.⁵³⁷

4 – Legal Objectivity.

At the start of this chapter I argued that the jurisprudential debates that thick and thin concepts were relevant to, were interrelated and often overlapped. Legal disagreement, judicial interpretation and judicial appointment are all closely connected to legal objectivity, because they are all underpinned by the notion of truth. Legal claims of knowledge (like any knowledge claim) are judged on their ability to be truth-apt: to be true representations of the way the world really is. Traditionally facts have been perceived as being truth-apt, whereas values haven't. Thick and thin concepts have been praised by meta-ethicists for their ability to elucidate how the evaluative and descriptive aspects of our world are captured by our conceptual practices, and they have also therefore been applied to the fact-value distinction. Thick and thin concepts have been thought to challenge both the traditional distinction between facts and values (see chapters two and three), and the traditional distinction between objective and subjective claims of knowledge. It is important to note that most meta-ethicists are not suggesting that the terms 'thick' concept and 'thin' concept can somehow solve the

⁵³⁶ It tracks the changes in conceptual analysis and the contemporary analytic philosophers recognition of concepts which blend evaluation and description in some manner. It is irrelevant for this purpose the name you attribute to such recognition e.g. blend concepts, entangled concepts, interpretive concepts or thick concepts.

⁵³⁷ Feldman advances a similar line of argument in her conclusion I return to these issues in more detail in my next chapter on legal education. see note 495

intractable debates surrounding objectivity (and the fact-value distinction) for these terms are merely a philosophical tool for conceptual analysis that can reinvigorate traditional debates (such as the fact-value distinction) but the academic discussions and new research generated by their use will hopefully result in academic progress (for example, a better understanding of the philosophical problems concerned). Not all legal theorists have been as cautious in their use of thick and thin concepts in matters pertaining to legal objectivity (and the fact-value distinction within law), this further evidences my earlier observation (chapter five) that the current use of thick and thin concepts within law lacks clarity. In this section (that is, of the chapter) I argue for the usefulness of thick and thin concepts within law, particularly in relation to jurisprudential debates concerning legal objectivity (the fact-value distinction in law will also feature in the following discussion because of its close connection to legal objectivity). However, a significant dimension of my argument will also be the demonstration that this is clearly one area of law where the ideas of thick and thin have been misunderstood and inadequately applied, to the detriment of the ideas themselves and the use to which they are intended to be put.⁵³⁸

Judith Jarvis Thomson is the first legal theorist whose work is relevant to both aspects of my argument in outline above: that thick and thin concepts are useful in relation to the jurisprudential debates concerning legal objectivity, and that this is one area of the law where their use needs sharpening. She utilizes Williams' notion of thick ethical concepts to disprove the fact-value thesis.⁵³⁹ Thomson argues that the application of a thick ethical concept is guided by fact and yet also contains a normative or evaluative component.⁵⁴⁰ Thomson elaborates: 'it is arguable that [such concepts].... have something important in common, a something in virtue of which they all yield

⁵³⁸ The fact-value distinction is a vast and complex topic and my intention is merely to demonstrate that it is one area of jurisprudence (one of many) where thick and thin concepts could be useful. For a more detailed discussion of the fact-value distinction that notes the meta-ethical literature on thick and thin concepts, see: Eric A. Bilsky, 'Metaphysical and Ethical Skepticism' (1997) 75 *Denver University Law Review* 187

⁵³⁹ She also argues: if successfully disproved this would also disprove the No-Reason Thesis (although I do not address this aspect of her account in this study). See: Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1992), 9

⁵⁴⁰ *ibid* at 10-11

Thomson dismisses the skeptics concern that morality does not mesh with the world (in particular descriptive aspects), she argues that we can find 'places where facts mesh directly with strong moral judgments to the effect that a person ought or ought not to do a thing.' *ibid* at 18

Moral skeptics who are concerned with the weakness of these moral judgments are told to discover the real source of their discomfort 'rather than succumbing to [this feeling].' *ibid* at 17

counterexamples to the Fact-Value Thesis.⁵⁴¹ She does not specify whether her notion of a thick concept is based on a separationist or non-separationist construction of the relationship between the evaluative and descriptive aspects, although this will clearly make a difference to the success of her challenge to the fact-value thesis (see chapter three).⁵⁴² Williams notes in *Ethics and the Limits of Philosophy*⁵⁴³ that thick ethical concepts may challenge the fact-value thesis, but this is never elaborated further and it is unclear whether he advances a separationist or non-separationist account (see chapter four).

Thomson's use of thick and thin concepts is very brief and Amy Peikoff argues that it does not really do the work Thomson requires it to do to support her argument (to disprove the fact-value thesis).⁵⁴⁴ Peikoff maintains that although applications of thick concepts are guided by facts whilst also containing a normative or evaluative component, these concepts cannot provide a solution to the fact-value thesis (or the no-reason thesis). Thick ethical concepts hide the problem (the fact-value distinction) behind our use of language, as she opines: 'in the act of using these concepts, one is already counting on the fact that there is some way to decide what is "good" or what "ought to be done" based on what *is*.'⁵⁴⁵ Peikoff's concern is that Thomson uses thick concepts as a substitute for an answer to the philosophical problem that underlies the fact-value distinction: the problem of objectivity. So, while thick and thin concepts might be used effectively to challenge traditional views regarding the fact-value distinction by facilitating conceptual analysis and reinvigorating philosophical discussion, they cannot be used as a substitute for the philosophical analysis that is required to solve this intractable philosophical issue.

⁵⁴¹ *ibid* at 11

⁵⁴² A separationist account such as prescriptivism could accommodate a distinction between facts and values, by maintaining that the prescriptive aspect of the thick concept is detachable and therefore separate from the descriptive aspect. A non-separationist account argues that the evaluative and descriptive aspects are incapable of intelligible separation, and therefore challenges the distinction between facts and values.

⁵⁴³ see note 487

⁵⁴⁴ Amy L. Peikoff, 'The Right to Privacy: Contemporary Reductionists and their Critics' (2013) 5 *Washington University Jurisprudence Review* 61

⁵⁴⁵ *ibid*

Re-thinking traditional notions of legal objectivity.

Traditional positivist accounts of legal objectivity advance an empirical notion of legal objectivity that may be unable to accommodate legal concepts that are not purely descriptive concepts (thick and possibly thin concepts), and therefore offer a good starting point from which to consider whether thick and thin concepts challenge traditional notions of legal objectivity (and whether such a challenge establishes the need to rethink legal objectivity).⁵⁴⁶

Heidi Feldman argues that we need to rethink traditional notions of legal objectivity, using blend concepts to consider the extent to which legal judgments could be said to be objective, and considers what kind of conception of objectivity would be required for blend judgments to be statements of fact.⁵⁴⁷ Feldman argues that blend concepts require a specific conception of objectivity - neither scientific, nor moral-rationalist conceptions can serve as they are - although they provide insight into what is required.⁵⁴⁸ The close parallels between the blend conception of objectivity and Williams' notion of knowledge derived from thick ethical concepts indicate the relevance of thick ethical concepts (in particular Williams' account of them) for legal discussions of objectivity.

Objectivity matters to blend legal judgments because of the relationship between law and interpersonal reasons, which goes a long way in providing these judgments with interpersonal validity. Sanctions only play a part in procuring obedience to the law (and fear-driven obedience is undesirable). A law that is interpersonally valid (in its own right) is less likely to be the result of a government who coerces and pressurises citizens into obeying the law, which is why legitimacy is closely related to laws interpersonal validity: it licences the imposition of law and penal sanctions on those

⁵⁴⁶ see notes 473, 474 and 526

⁵⁴⁷ see note 473 at 1190

Feldman uses both the term 'blend concept' and 'entangled concept' to refer to a concept that bears close proximity to Williams' term 'thick ethical concept'. In light of this it is important to bear in mind that Feldman's Blend Conception of Objectivity is theoretically applicable to entangled concepts, and I argue that it is also applicable to thick concepts.

⁵⁴⁸ Feldman combines this argument with a wider assertion – developing a blend conception of objectivity can teach us something about the nature of blend concepts and sharpen our understanding of the nature of objectivity – the same argument is applicable to thick concepts. Developing a conception of objectivity that can accommodate thick concepts will not only be revealing about the nature of those specific thick concepts (and potentially the distinction between thick and thin concepts in general), it will also be revealing about legal objectivity (and objectivity in general).

who dissent. Objectivity is an important aspect of legitimacy but it is not the only criterion for establishing legal legitimacy, and objectivity is not the only factor that is considered when deciding whether to apply a blend concept or adopt a blend judgment in a particular instance.

Feldman argues that the reason-givingness of blend concepts - combined with the tendency of reasons to influence the social world we live in - explains why when deciding whether to apply a blend concept in a particular situation we often consider the effects of applying the blend concept on the social world. This is an acceptable consideration, because it relates to how one wants the social world to be e.g. classifying Sally as negligent will affect how others behave because it will discourage them from behaving like Sally, and this prospect may then appropriately influence your decision whether to classify Sally as negligent (you may not want your classification of Sally as negligent to deter others from behaving like Sally because it may not always be considered negligent).

The world-guidedness of blend concepts has a normative quality that means their application is partly governed by facts about the world which are independent from the concept users preferences for how the world should be. This is why sometimes certain uses or refusals to use blend concepts seem odd, misguided or mistaken. Of course there can be unusual uses e.g. 'claiming that a pianist's rendition of _____ was rude.' The point though is that we can't classify things as rude or negligent just because we want them to stop (e.g. calling someone rude for asking you to pass the salt just because it annoys you). The world-guidedness of blend concepts prevents these inappropriate uses; it restricts the extent to which a concepts application can be goal-driven.

The word-guidedness restriction is important because without it the blend concept can fail to maintain its reason-givingness. Blend concepts derive their reason-givingness from their place within the evaluative taxonomies they belong to.⁵⁴⁹ The taxonomies refer to specific human needs and interests, which are served by specific categorisations of the world. The blend concepts are reason-giving because they serve

⁵⁴⁹ Feldman argues: 'Blend concepts are members of evaluative taxonomies. Evaluative taxonomies categorize the world for us, just as scientific taxonomies do, but they afford us evaluative, rather than explanatory power. They enable us to make distinctions of worth rather than distinctions of causal role.' see note 473 at 1195

the evaluative point of the taxonomy. If you were to ignore this and apply blend concepts to serve your goals and interests, they would fail to provide reasons because they didn't serve the evaluative point of the taxonomy. Others would then be disposed to question these puzzling uses of the blend concept and start to question its reason-givingness even in standard applications.

Correct application according to Feldman turns on whether certain facts marked out by the taxonomy obtain (she uses 'correct' in the sense that other concept users of that evaluative community agree with the use, based on their prevailing norms of use). Often the facts that guide the concepts use will be social, - 'conventional mores, shared cultural ideas, community values, and customs.'⁵⁵⁰ Correct application especially in hard cases, is also based on ascertaining and interpreting the evaluative point(s) of the relevant taxonomy and this derives from the functions of the taxonomy. Evaluative taxonomies are responsive to particular human needs and interests, and their evaluative point is thus a function of what it takes to satisfy those needs and interests. Therefore correctly applying a blend concept requires sensitivity to the human needs and interests of the evaluative taxonomy the blend concept belongs to.

It is significant to note that thick concepts could also be grouped together under evaluative taxonomies (especially thick legal concepts). It can be clearly noted within law that there is a contrast between legal concepts that are applicable to multiple areas of law (concepts such as GOOD, RIGHT and WRONG) and legal concepts that are specific to one area of law or at least lack a general legal application (such as those concepts specific to criminal law e.g. THEFT, MURDER and MANSLAUGHTER). I therefore anticipate that Feldman's discussion of the role of evaluative taxonomies in determining the application of a blend concept is relevant to thick legal concepts. If, as Feldman argues,⁵⁵¹ evaluative taxonomies are responsive to particular human needs and interests then investigating the nature of evaluative taxonomies within law could illuminate the needs and interests that influence the legal developments within particular areas of law.

The above account of the blend conception of objectivity suggests that a kind of legal objectivity may be possible, even if we have to re-think our previous notions of

⁵⁵⁰ *ibid*

⁵⁵¹ *ibid*

objective knowledge. Williams advances a similar line of argument but within the context of ethics.⁵⁵² Joseph Raz has also considered the role of thick and thin concepts in elucidating legal objectivity (although they were not his primary focus), but his conclusion is far less positive (he does not suggest outright that we abandon legal objectivity, but he does deny the possibility of objectivity for thick legal concepts).⁵⁵³ I turn to his account now to demonstrate that accommodating thick and thin concepts within law may have negative implications for legal objectivity, especially if a traditional (empirical) account of objectivity is desirable for law (this desire may be inappropriate for law in the first place, in which case the implications of thick and thin concepts may not be negative).

The Abandonment of Objectivity.

Raz in his *Notes on Value and Objectivity*⁵⁵⁴ distinguishes between parochial and non-parochial concepts: “Parochial concepts” are concepts which cannot be mastered by all, not even by everyone capable of knowing anything at all. “Non-parochial concepts” can be mastered by anyone capable of knowing anything at all.’⁵⁵⁵ Evaluative or normative concepts are identified as parochial because they too are interest-related concepts (because mastery of the concept requires understanding some interests or others); thick concepts and our ‘abstract normative concepts’ (thin concepts) in virtue of being a type of evaluative concept are also parochial.⁵⁵⁶ Raz’s attention is focused on parochial concepts and both thick and thin concepts arise in his discussion only to the extent that they are a type of parochial concept and can potentially illuminate the discussion of parochial concepts.⁵⁵⁷ For example: ‘Doubts

⁵⁵² see note 487

⁵⁵³ In this chapter I address only one of Raz’s recent contributions: Joseph Raz, *Engaging Reason* (Oxford University Press, 1999) because this is where he offers his most in-depth analysis of thick and thin concepts. Any other mention of thick and thin concepts in later publications, borrows the term from this earlier discussion. For example see: Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *Minnesota Law Review* 1003, he only mentions thick concepts once, when he states that it is doubtful thick concepts can be reduced down to thin concepts. *ibid* at 1007

⁵⁵⁴ Joseph Raz, ‘Notes on Value and Objectivity’ in *Engaging Reason* (Oxford University Press, 1999), 118-160

⁵⁵⁵ *ibid* at 132

He further elaborates that parochial concepts are those which require particular perceptual capacities (e.g. colour concepts) as opposed to some perceptual capacity or other. Parochial concepts are also those whose mastery presupposes interests or imaginative or emotive capacities that neither are nor ever can be shared, by those capable of possessing knowledge.

⁵⁵⁶ The examples he cites are all thin concepts and from the tone of the rest of the discussion it is clear thin concepts are what he had in mind at this point. *ibid*

⁵⁵⁷ It is important to highlight that this is the first point in *Engaging Reason* that either thick concepts or thin concepts have been discussed, yet there is no footnote or reference to Bernard Williams or any other

have been cast on the objectivity of parochial concepts, on the possibility of knowledge that depends on their possession, and cannot be reformulated without their use. I will examine some grounds for such doubts.⁵⁵⁸ The term thick concept reappears regularly throughout his chapter but only to serve Raz's primary purpose, they are not accompanied by references to or discussions of the relevant meta-ethical literature (See chapter two and three).

Thick concepts resurface twice in *Notes on Value and Objectivity*.⁵⁵⁹ First in Raz's discussion of social authority where he acknowledges that 'thick concepts are indeed crucial to any attempt to establish the objectivity of practical thought, and its conformity with the relevance condition.'⁵⁶⁰ The relevance condition is explained as a question that needs answering: 'are there grounds which are not merely persuasive, but logically relevant to the confirmation or disconfirmation of any practical thought?'⁵⁶¹ Thick concepts seem to offer the most promise for an affirmative answer, yet they seem to depend on a shared culture and shared values which means their truth-aptness is dependent on the social facts of shared views; and if the truth-aptness of practical propositions is dependent on the truth-aptness of social facts then this is problematic. Raz states:

Typically, just about all our evaluative conclusions and reasons for them are typically expressed by the use of thick evaluative concepts. An account of the relevant reasons which support or undermine evaluative or normative propositions will largely consist in an explanation of the relations between thick concepts. But, and that is where the objection starts, mastery of thick concepts depends on shared understandings and shared judgments. These shared judgments both enable us to understand the meaning of thick evaluative terms, and incline us to accept the legitimacy of their use. There is no independent way of validating the legitimacy of the use of thick concepts. Hence, the validity of evaluative standings and judgments, that is, on social facts. The truth or correctness of value propositions cannot, however, depend on social facts. Such dependence will make value judgments contingent, for the facts they depend on are contingent, and arbitrary – whether or not one has cogent reasons to accept them will depend on the evaluatively

author regarding these terms or explanation of what is meant by the terms 'thick concept' and 'thin concept'. Williams is later referenced (at 137 and 138) but even then the terms 'thick concept' and 'thin concept' are not elucidated.

⁵⁵⁸ *ibid* at 133

⁵⁵⁹ see note 554

⁵⁶⁰ *ibid* at 146

⁵⁶¹ *ibid* at 145

arbitrary fact of one's membership in one culture or another. Worst of all, if the truth conditions of evaluative propositions are contingent social facts then they cannot be normative, they are merely statements of those facts whose existence renders them true.⁵⁶²

Raz's dismissal of social facts as a legitimate ground for legal knowledge poses a problem for Williams' defence of ethical knowledge derived from thick concepts; this attack on the legitimacy of social facts also has clear undertones of legal positivism.⁵⁶³ Raz's account of law ultimately leads to the conclusion that traditional (empirical) notions of legal objectivity should be abandoned: whilst the normative dimension of law is clearly connected to social facts (and therefore thick concepts) it cannot depend on social facts (or thick concepts) for its legitimacy and until we have an alternative explanation of the way practical thought meets the relevance condition we must accept that it lacks objectivity.⁵⁶⁴

Henry Mather reaches a similar conclusion to Raz, but his approach seems to be closer to Williams and Feldman, because he attributes some form of truth to legal statements that use thick legal concepts. Mather utilises Williams' idea of thick ethical concepts to delineate different forms of moral truth, such as constructive truth.⁵⁶⁵ Constructive truth is always relative to some social practice⁵⁶⁶ - a regular pattern of conduct that is guided by shared rules accepted and used to evaluate behavior by members of the social group - and such constructive moral truth 'is likely to be a linguistic practice, a moral practice, or a practice concerning rationality in practical reasoning.'⁵⁶⁷ Mather

⁵⁶² In 'The Value of Practice' he revisits his earlier discussion of socially constituted values (values that are constructed by social practices) and discusses conceptual priority. He opines that 'thin and thick concepts are interdependent. Thick concepts have to be explained by reference to thinner ones in order to satisfy the requirement of intelligibility. The thin concepts, on the other hand, while explained by reference to thicker ones, also have an open-ended aspect: new thick concepts subject to them can always emerge. This makes them relatively independent of the thick concepts currently subsumed under them.' See: Joseph Raz, 'The Value of Practice' in *Engaging Reason* (Oxford University Press, 1999), 202-217, 146

⁵⁶³ This is hardly surprising - Raz is considered one of the key contemporary legal positivists in anglophone analytic philosophy of law.

⁵⁶⁴ It is interesting to note that this apparent lack of objectivity does not seem to concern Raz: where others have denied the normative aspects of law in order to uphold legal legitimacy and objectivity, Raz prefers to acknowledge normativity and accept the resulting problems this poses for legal objectivity.

⁵⁶⁵ Asserting constructive truth based on linguistic practices requires a form of 'definism' (definists claim moral statements are truth-apt if they contain moral terms that have factual descriptive meaning) such as that advanced by Philippa Foot who argues that moral terms have determinate descriptive meaning. Philippa Foot, *Virtues and Vices* (1978), she argues that there are certain factual criteria that must be met for a moral term to be used properly at 102-105.

⁵⁶⁶ Henry Mather, 'Natural Law and Right Answers' (1993) 38 *American Journal of Jurisprudence* 297, 313

⁵⁶⁷ *ibid* at 314

argues that thick concepts are truth-apt in a constructive sense, but that they are still insufficient guidelines for the resolution of moral dilemmas and are therefore incapable of resolving the conflicting moral considerations that law makers are faced with, when different moral considerations favour the adoption of different laws.⁵⁶⁸ Despite taking different routes both Mather and Raz conclude that thick legal concepts are not compatible with legal objectivity as a kind of empirical knowledge.⁵⁶⁹

The second time thick concepts resurface is in Raz's consideration of whether evaluative objectivity is in any way dependent on (and therefore affected by) how thick concepts are deployed. A familiar charge levied against thick concepts is that their close connection to evaluative standpoint (or to revert back to the terminology Raz has been favouring: the dependence of thick concepts on shared culture and shared values, and therefore social facts) means that thick concepts are culturally specific and can only be understood by members of that culture. Raz dismisses this charge:

There is little doubt that often we fail to understand concepts embedded in a culture or system of thought which is alien to us. But is there any reason to think that even given favourable conditions we could not master them? That they cannot be exhaustively or satisfactorily explained using our concepts does not establish that conclusion, for we can learn them directly, by being exposed to their use, rather than through translation. Sometimes we could do so by actually living in the alien society, at other times it is possible to learn their meaning by learning about that society and reconstructing in imagination, or simulation, its ways and beliefs.⁵⁷⁰

Accepting the claim that members of a culture are only capable of understanding the concepts of their own culture and can therefore never understand those of another culture, results in the implausible claim that our capacity to acquire concepts is limited to one culture only. However this limitation is framed - maybe because our capacity to

Both Wittgenstein and Hart discuss similar notions of normative regularity at the social level (social rules), see: Ludwig Wittgenstein, *Philosophical Investigations* and H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd edition, 1994)

⁵⁶⁸ Mather is discussing Natural Law so there is an assumption that judges do and should decide moral dilemmas that present themselves within law, it is not appropriate to my discussion (of the use of thick concepts in law) to challenge that assumption.

⁵⁶⁹ Mather's discussion of thick and thin ethical concepts is brief and his lack of referencing to the wider meta-ethical literature (although he does appropriately reference Wittgenstein and Foot who were important influences on Williams) implies that these terms stem solely from Williams and indicates Mather's failure to capture the complexity of these terms. An alternative construction of the distinction between thick and thin ethical terms (such as a non-separationist account) may have provided an account of moral truth and moral dispute resolution that better defended the right answer thesis.

⁵⁷⁰ see note 526 at 157

grasp concepts is exhausted or blocked after we have understood our own culture – there seems to be only one possible reason for such a suggestion: that complete understanding of a concept requires an understanding of its relation to the rest (all) of the concepts in the concept users repertoire. The implausibility of this claim is demonstrated by a wider look at language practices: ‘It flies in the face of the evidence. There were and are people who inhabited more than one culture, and understood both. It also overlooks the fact that our own culture contains concepts derived from different systems of thought, which have not merged together.’⁵⁷¹ Whilst it may be possible to agree with Raz’s dismissal of the incommensurability of thick concepts on the basis of practical evidence (that we can observe bilingual individuals), how does this fit with his negation of their ability to legitimize knowledge claims: how can we be sure these individuals are bilingual as opposed to lucky in their application of ‘foreign’ concepts.⁵⁷² Such questions as these are normally the province of anthropology. Anthropologists such as Clifford Geertz have noted the close connection between law and morality, and the relevance of both to their investigations of other cultures: ‘Law, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it.’⁵⁷³ Meta-ethicists have also paid attention to these issues because of their relevance to thick ethical concepts. As can be seen from the above discussion the credibility of a distinction between facts and values is an underlying question that runs throughout many aspects of the legal objectivity debate and the meta-ethical literature on thick and thin concepts. There are certain legal theories, such as natural law theories, where this question is brought to the forefront.

Recently contemporary natural lawyers such as John Finnis, have contributed to this discussion regarding the nature of social (legal) facts.⁵⁷⁴ Simon Hope and John Finnis both agree that anthropological evidence indicates a lack of substantive core moral

⁵⁷¹ *ibid* at 158

⁵⁷² A similar question could be asked regarding their own (first language) concepts.

⁵⁷³ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1985), 218

⁵⁷⁴ Finnis’ most well known work is: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980). His more recent contributions have incorporated the notions of thickness and thinness into his virtue jurisprudence. See: John Finnis, *Reason in Action: collected essays volume I* (Cambridge University Press, 2011); John Finnis, *Human Rights and the Common Good: collected essays volume III* (Cambridge University Press, 2011); and John Finnis, ‘A Response to Harel, Hope, and Schwartz’ (2013) 8 *Jerusalem Review of Legal Studies* 147

values shared across all cultures (social moralities).⁵⁷⁵ Finnis argues that despite this there are still ‘some values (basic human goods) and practical principles more or less self-evident to all adults of more or less normal experience and intelligence, anywhere and anytime.’⁵⁷⁶ These basic human goods can be derived through practical reasonableness, in turn establishing an objective basis for the action-guidance these basic human goods provide.⁵⁷⁷ Their objectivity may be challenged given Raz’s criticism of ‘social facts’ above. Contemporary natural lawyers have therefore (like Raz above) considered the relationship between ‘social moralities’ and ‘social facts’. For example Hope states: ‘To say that moral reflection is shaped by the social morality or moralities one has been habituated into is *not* to say that the deliverances of a social morality *determine* the outcome of one’s moral reflection to any substantive degree. All bearers of a social morality draw on roughly the same repertoire of thick concepts in arriving at their own individual ethical outlooks, but that is as far as anything shared goes.’⁵⁷⁸ The aim is to deny any significant reliance on social facts (shared knowledge) and instead argue that thick or thicker accounts of the basic goods (which are more closely connected to objective facts) underpin these goods and provide objective reasons for action; although there is room for disagreement (as shown by Hope and Finnis’ disagreement) regarding the degree of thickness required to provide reasons for actions that support the correct conception of human goods.⁵⁷⁹ Framing the issue of legal objectivity within the context of natural law theory explicitly draws attention to another way of framing the debate – the relationship between law and morality – suggesting that this is another area of law where thick and thin concepts could prove useful. The close connection between jurisprudential debates regarding objectivity, the distinction between facts and values, and the relationship between law and morality indicates that if thick and thin concepts are useful in one area of jurisprudence, they are likely to be useful to many other areas of jurisprudence due to the interrelated or

⁵⁷⁵ Simon Hope, ‘The Basic Goods and the “Lawlike” Use of Reason: Comments on *Human Rights and the Common Good*’ (2013) 8 *Jerusalem Review of Legal Studies* 136 and John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980)

⁵⁷⁶ John Finnis, ‘A Response to Harel, Hope, and Schwartz’ (2013) 8 *Jerusalem Review of Legal Studies* 136, 147

⁵⁷⁷ *ibid* at 164

Finnis notes that his term ‘practical reasonableness’ is a translation of Aquinas’ PRUDENTIA and Aristotle’s PHRONESIS.

⁵⁷⁸ see note 575 Hope at 140

⁵⁷⁹ Hope argues: ‘Finnis’s account of the accessibility of the basic goods as thick reason-giving concepts appears, in this light, implausibly idealized: Finnis either downplays the diversity and contingency of social moralities, or he builds into the conditions for accessibility an identification with one substantive, thick understanding of human good.’ *ibid* at 145

connected nature of jurisprudential debates (maybe even those jurisprudential debates and ideas that have fallen out of fashion).

Natural law theory (and virtue jurisprudence) has undergone a recent revival and the reference to thick and thin concepts by Hope and Finnis demonstrates that these terms can usefully enrich our understanding of key jurisprudential debates and shared core philosophical concerns (such as objectivity); and spearhead the revival of classical theories and ideas that could offer interesting new avenues for jurisprudential research and discussion.

Natural law is not the only virtue ethics-based approach to law that has drawn upon thick and thin concepts. Linghao Wang and Laurence Solum utilise Bernard Williams' work on thick concepts in their revival of Confucian Virtue Jurisprudence.⁵⁸⁰ They argue that thick concepts can provide an insight into the Confucian doctrine of correcting names and the normativity of law. Confucian names are like thick ethical concepts, because both can be used to categorise and pick out similar and dissimilar kinds of things, whilst conveying ethical attitudes as to what is right and morally wrong; thus they both seem to indissolubly entangle descriptive and prescriptive elements.

The aim of the Confucian doctrine of correcting names is therefore normative guidance, a role shared by the law:

Since names are concepts with rich ethical meaning, they provide ethical guidance for actions. Confucian philosophers' ultimate goal in emphasising the correction of names is to give people ethical guidance through the application of names in the correct way and to the correct persons and actions.⁵⁸¹

⁵⁸⁰ It is worth noting at this point a related paper presented by Linghao Wang at a conference. Linghao Wang 'Living by Thick Legal Concepts: A Confucian Account of how Law Guides People's Actions.' Solum has produced a number of articles that advocate virtue jurisprudence, see also: Lawrence B. Solum, 'Pluralism and Modernity' (1990) 66 *Chicago Kent Law Review* 93; Lawrence B. Solum & Colin Farrelly (eds), *Virtue Jurisprudence* (Palgrave Macmillan, 2008); Lawrence B. Solum, 'Virtue Jurisprudence: A Virtue-Centred Theory of Judging' (2003) 34 *Metaphilosophy* 178; and Lawrence B. Solum, 'Virtue Jurisprudence: Towards an Aretaic Theory of Law' in Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho (eds), *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (Springer, 2013)

⁵⁸¹ Linghao Wang and Lawrence B. Solum, 'Confucian Virtue Jurisprudence' in *Virtue, Law, and Justice* (Hart Publishing, 2012), 114

Confucian names such as REGICIDE and CRUELTY,⁵⁸² like thick legal concepts provide reasons for action and emphasise the normative functions of law.⁵⁸³ The exact nature of Confucian names (and thick ethical concepts) that they suggest is unclear.⁵⁸⁴ They suggest that there might be a multi-layered structure concerning the thickness of Confucian names, but it is unclear how this correlates to the distinction between a difference of degree and a difference of kind as discussed by the meta-ethical literature on thick concepts.⁵⁸⁵

Despite concerns regarding inconsistencies in their account of the nature of Confucian names and thick ethical concepts, which are complicated further by the multi-layered structure they suggest their account raises many of the shared, core philosophical concerns that have already been raised in this chapter and demonstrates that thick and thin concepts could be useful for jurisprudence as a way of reframing classical ideas, and potentially lead to the resurgence of the associated classical theories of law. Their work also supports my earlier observation (chapter five) that the legal literature on thick and thin lacks clarity, for the terms thick and thin concepts to be useful within law the legal understanding and application of these terms needs sharpening and rendering more consistent; it is only after this process that these terms can be utilised within law to their full potential.

⁵⁸² REGICIDE is classified as thinner than CRUEL because the action requires deep and complex evaluation of whether the person in question is virtuous and fulfils the political obligations attached to his political role and is therefore justified in claiming to be a lord. Whereas they argue that cruel doesn't require such deep and complex evaluations prior to application. 'Usually, we are able to see cruelty: we are able to perceive cruelty in the situation. In the case of regicide, more than perception is required. For this reason, we believe that regicide is thinner than cruel.' *ibid* at 124

⁵⁸³ Normally the distinction between thick and thin concepts is based either on a lack of descriptive content or a more minimal amount of descriptive content being conveyed by thin concepts. It could be potentially harder to reach agreement regarding a thin concepts application, because they lack the levels of descriptive content found in thick concepts and the evaluative content is also less specific. This is not how they frame it though.

⁵⁸⁴ It is unclear whether they are proposing an amalgam account of Confucian names (and thick concepts) or whether they are advancing a difference of degree: 'Our view of the doctrine of correcting names explicitly adopts the idea that what we call the thickness of ethical concepts is scalar – although the scale maybe coarse-grained rather than continuous.' *ibid*

⁵⁸⁵ Wang and Solum state: 'Thicker names like cruel or courageous are in the lower layers, layers that are tightly entangled with the non-ethical qualities of the world. Thinner names like regicide or thief, whose application may involve moral norms or other thicker names, are in the upper layers – where the entanglement of fact with value is mediated by the system of social norms. Due to their thinness, the layer of thinner names is tied more closely to Li. Expressed from a different angle, the world-guidedness of thinner names is dependent on the normative system of particular communities.' *ibid* at 125

5 – Conclusion.

The aim of this chapter has been to demonstrate the relevance of thick and thin concepts for jurisprudence, by demonstrating their usefulness within jurisprudential debates; and to do this I focused on two particular topics that arise frequently within jurisprudence: the judiciary and legal objectivity. This chapter addressed the work of legal theorists working within these two topic areas that had already begun to utilise the terms thick concept and thin concept within their work with varying degrees of depth, which adds strength to my thesis (that thick and thin concepts are useful within law) in relation to jurisprudential debates.

Chapters five, six and seven (this chapter), whilst containing their own individual arguments for the relevance of thick and thin concepts in relation to specific areas of law (chapter five: legal concepts; chapter six: legal positivism; and this chapter: jurisprudential debates), all advance the same overall argument: thick and thin concepts are useful within law, but this usefulness is currently limited because these terms lack sufficient understanding and consistent application within law. Whilst this study of thick and thin concepts does not offer or favour a particular approach to thick and thin concepts (though like many of the legal theorists addressed within this investigation I have used Williams' formulation of thick ethical concepts) because of the many possible positions available and the disagreement that surrounds these positions (see chapters two and three), this study has demonstrated that it is still possible for these terms to prove themselves useful within law by paying particular attention to Williams' formulation (which is commonly used by legal theorists). Further legal (and possibly philosophical research) into this area (thick and thin concepts within law) will not only improve the legal understanding of these terms, which could render future applications more consistent and precise, but it may also reveal a particular position (meta-ethical account of thick and thin concepts) as more favourable.

The areas of law so far addressed within this investigation (legal concepts, legal positivism and jurisprudential debates) are all closely connected and any argument for the usefulness of thick and thin concepts within these topic areas is accompanied by the suggestion that these terms will also be relevant elsewhere within law; and to demonstrate this the following chapter considers the current use and usefulness of

these terms for legal education. Considering the relevance of thick and thin concepts for legal education adds a practical dimension to this so far theoretical research project (it demonstrates that there are practical implications for the use of these terms within law) and this adds strength to my thesis.

Chapter Eight: Thick and thin in Legal Education

1 – Introduction.

At present both the legal profession and legal system are undergoing a series of unprecedented changes due to legislative enactments, and these changes have in turn impacted upon legal education. The Legal Services Act 2007 (LSA) and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) have both enabled and necessitated dramatic structural changes to the profession, which have also impacted upon its ethos at all levels including education.⁵⁸⁶ This chapter argues that the transformation the legal profession is currently undergoing will dramatically alter the shape of legal education and the future of the legal profession to such an extent that now is the opportune time to rethink legal education and consider the potential usefulness of the distinction between thick and thin concepts within law school teaching.

The Legal Education and Training Review (LETR)⁵⁸⁷ reflects upon the current legal curriculum and was intended to be the most substantial review of legal education and training since the ‘Ormrod Report’ 1971.⁵⁸⁸ The LETR concluded that there was no evidence to suggest that the current education and training system was unfit for purpose, but there was evidence to suggest that it needed improving, as existing strengths needed to be built upon and weaknesses remedied. One of the main observations to emerge from the LETR is the increasing commercialisation of the legal profession and the need to adapt legal education to better reflect the demands this change places on legal professionals.⁵⁸⁹

⁵⁸⁶ One of the important implications of the LSA 2007 was the provisions which enabled law firms to become Alternative Business Structures in partnership with other occupations, this marks a change in the distinctiveness of both the legal profession and legal services. The cuts to legal aid implemented by LASPO 2012 have dramatically eroded the ‘social service’ aspect of the legal profession. See: Steven Bint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (Princeton University Press, 1994); Harry W. Arthurs, ‘The State We’re In: Legal Education in Canada’s New Political Economy’ (2001) 20 *Windsor Yearbook of Access to Justice* 35

⁵⁸⁷ Work commenced on the LETR in May 2011 and the report was published June 2013. The LETR was initiated by the Legal Services Board (LSB), which is a regulatory overseer in the legal sector created by the Legal Services Act 2007. The responsibility for managing the LETR (the LETR executives) fell to the three main legal regulators: the Solicitors Regulation Authority (SRA), the Bar Standards Board and ILEX Professional Standards. The LETR was conducted by a research team of university academics who reported to the LETR executives.

⁵⁸⁸ Committee on Legal Education, Report of the Committee on Legal Education (Cmmd 4595, 1971) (Ormrod Report)

⁵⁸⁹ This chapter presents a brief survey of the concerns (regarding the increasing commercialization of the legal profession) that were noted by a selection of the presenters at the second conference held by Birmingham Law School’s Centre for Professional Legal Education and Research (CEPLER) held in October 2013. The conference and the following associated publication aimed to bring together leading academics, senior figures from the professional practice, representatives of the regulatory authorities and

Julian Webb,⁵⁹⁰ one of the lead researchers, notes that the demands of powerful commercial customers for more focused and affordable legal services has led to the redistribution of many simpler routine legal tasks to those staff who are less qualified and cheaper to employ.⁵⁹¹ This raises questions about the legal skills and legal ethics that the educators should be trying to inculcate into this new breed of legal employee – the non-lawyers and para-legals – operating in the lower echelons of the legal profession. The unbundling of the legal profession and increase in the number of legal employees who are not trained solicitors or barristers, means that any changes that are made to legal education and regulation will still only apply to those who have undertaken the traditional routes of entry into the profession (as it is only lawyers who are regulated by the LSB). Any discussions of reform regarding legal education and regulation must take this factor into consideration unless they wish such discussions to be rendered a mute point. Alex Roy⁵⁹² therefore suggests that any reforms of legal education and regulation must be undertaken flexibly and may need to move away from standard models of regulation.⁵⁹³

policy makers to reflect on the key issues that arise from the recent changes within law (noted above). For the associated collection of papers see: Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015). CEPLER aims to promote in undergraduate and graduate legal education an enhanced awareness of professional culture, values and practices and to assist in cutting edge research on both the legal profession and legal education.

These contributors to the conference (as opposed to others that also presented) have been noted in this chapter because of the variety of positions they occupy within the profession and their differing viewpoints. Although their responses do not refer to thickness or thinness in any way, I assert that future academic responses to the LETR could benefit from a consideration of the literature on thick and thin concepts because these concepts can be useful in enriching understanding of legal values (legal ethics).

⁵⁹⁰ Professor Julian Webb currently teaches legal ethics and legal theory at the University of Melbourne Law School, having previously held chairs at the Universities of Warwick and Westminster (in the UK).

⁵⁹¹ Webb offers the viewpoint of an academic researching within the fields of legal education policy and theory; the ethics and professional regulation of lawyers; social and legal theory; and the ethics of socio-legal research. Julian Webb, 'The LETR's (Still) in the Post: The Legal Education and Training Review and the Reform of Legal Services Education and Training – a personal (Re)view' in Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015), 97-138

⁵⁹² Alex Roy was the Head of Development and Research at the Legal Services Board (LSB) until April 2014, when he became Manager (Pensions and Investments) at the Financial Conduct Authority. See his paper: Alex Roy, 'Creating a More Flexible Approach to Education and Training' in Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015), 169-180

⁵⁹³ He notes that the strategy adopted by the financial services regulators post the credit crunch may provide an appealing example, although it is unclear whether such a regulatory approach will fare any better. Colin Scott, 'A Meta-Regulatory Turn? Control and Learning in Regulatory Governance' in Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker (eds), *The Law of the Future and the Future of Law: volume II* (Torkel Opsahl Academic EPublisher, 2012), 61-71

Richard Abel and Julia Evetts both argue that increased marketisation is bad for consumers because it often leads to a trade off between quality and prices, the associated unbundling of legal services places legal consumers in a position where they are unable to evaluate the appropriate legal solutions or resources that they need.⁵⁹⁴ Abel worries that the increasing freedom and liberalisation offered by marketisation of the legal sector may actually increase social injustice and inequality – ‘free’ market ideology can facilitate poor pay and insecure working conditions – and most often those affected the worst are those who are already marginalised by society.⁵⁹⁵ Andrew Sanders also voices concerns over increasing marketisation of the legal profession and the effect this has upon legal education - the results of this will be a legal curriculum that focuses on the commercial aspects of law and so on the wealthy, neglecting the poor and questions of social justice – the practical implications of this for the legal profession will be an increasing lack of accountability.⁵⁹⁶

The LETR identified a need for legal educators to balance the greater desire for ‘commercial awareness’ and managerial skills within law students as voiced by the profession, against the need to ensure that legal ethics, values and professionalism remain central aspects in an ever increasingly commercialised legal profession.⁵⁹⁷

⁵⁹⁴ Richard Abel is the Connell Distinguished Professor of Law Emeritus and Distinguished Research Professor at UCLA School of Law, California. He is a leading global scholar on the legal profession known for his seminal text: Richard L Abel, *English Lawyers between Market and State* (Oxford University Press, 2003). He was also the keynote speaker at the conference, see his conference presentation here: Richard L Abel, ‘An Agenda for Research on the Legal Profession and Legal Education: One American’s Perspective’ in Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015), 201-220

Julia Evetts is Emeritus Professor at the School of Sociology and Social Policy at The University of Nottingham and has established an international reputation in the field of sociology of professional groups, practitioners and clients. Julia Evetts, ‘Professionalism, Enterprise and the Market: Contradictory or Complementary?’ in Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015), 23-36

⁵⁹⁵ Increasing unemployment rates in law graduates, lower starting salaries and reductions in training contracts/pupillages are all cited as evidence of this.

⁵⁹⁶ Andrew Sanders offers the perspective of someone involved with both the academic and regulatory aspects of the legal professions. He is Professor of Criminal Law and Criminology at the University of Birmingham, and Head of the School of Law; he is also a board member of the Bar Standards Board and former Chair of the Committee of Heads of University Law Schools in England and Wales. Andrew Sanders, ‘Poor Thinking, Poor Outcome? The future of the Law Degree after the Legal Education and Training Review and the Case for Socio-Legalism’ in Hilary Sommerlad, Richard young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015), 139-168

⁵⁹⁷ It is important to note that even within legal education and training the responses of the various regulatory bodies differ. The LSA’s objectives include encouraging: ‘an independent, strong, diverse and effective legal profession, promoting the public interest, improving access to justice and supporting the rule of law.’ *ibid* at 16

Sommerlad et al note that the direction legal education will take in relation to balancing these competing aims will be dependent on the definitions of such concepts, which are subject to wider and more powerful socio-political forces outside of the ambit of the LETR.⁵⁹⁸ A better understanding (knowledge) of the legal values and concepts concerned, which can be gained through conceptual analysis using the analytic distinction between thick and thin concepts can help both students and educators to balance the competing interests.

In his response to the LETR Andrew Sanders suggests that it is still possible for all legal employees (including non-lawyers and para-legals) to demonstrate an awareness of their capacity to shape the law and society, but for this to be possible the law school curriculum needs to move away from traditional doctrinal-based teaching (studying the rules) and towards socio-legalism (studying the socio-economic impact of the law and lawyers). This approach has not been supported by the LETR.⁵⁹⁹ Drawing from my experiences as both an educator and a student this chapter notes the practical relevance of thick and thin concepts within law by highlighting their usefulness within a critical approach that aims to facilitate a move away from traditional doctrinal-based teaching. Invoking the distinction between thick and thin concepts within legal education allows educators to highlight the interplay between the evaluative and descriptive aspects of legal concepts and challenge the traditional doctrinal understanding of law.

The full effect of the LSA, LASPO and LETR remains unknown, but it is clear that they will affect all those involved within the legal profession – including both educators and practitioners – and are of direct relevance to this investigation (in particular this chapter on legal education).⁶⁰⁰ So far the changes within legal education have been less revolutionary than elsewhere within the profession: much of the legal curriculum remains the same – doctrinal and traditional - but there have been modifications made to take account of the skills movement within society and the

The Legal Services Board (LSB) has not chosen to emphasise the objectives the LSA identified, it has instead focused on promoting the interests of consumers and promoting competition within the legal market.

⁵⁹⁸ see note 589 at 15

⁵⁹⁹ The LETR reported that practitioners find jurisprudence and socio-legal studies the least relevant subjects in the legal curriculum, although Sanders notes that the LETR provides no scientific evidence to support this claim. see note 596

⁶⁰⁰ Many of these issues were discussed at the second conference of Birmingham Law School's Centre for Professional Legal Education and Research (CEPLER) held in October 2013.

diversification of the student body.⁶⁰¹ More law schools now offer ‘clinic’ teaching and employability based modules within their law programmes.⁶⁰² Law school programmes have started to push the need for a business and economic based understanding of the law (even if this is only in certain modules or areas of law) in response to the increasing dominance of the corporate sector within the legal profession.⁶⁰³ Law schools have started to reflect theoretical changes within the law – such as a socio-legal approach to law – through both their teaching styles and research output.⁶⁰⁴ Despite changes to legal education and attempts by many universities to improve graduate employability it is becoming harder for law graduates to qualify as lawyers.⁶⁰⁵ Competition for pupillages and training contracts has increased and the number of paralegals has increased.⁶⁰⁶ Legal education has begun to respond to the changing legal climate, but as responses to its findings note there is still a big gap between the shape of the current legal curriculum and the shape of the current legal profession (or, as some contend, market). Many law schools have tried to close this gap by offering new modules and methods of assessment that aim to prepare students for the legal profession and cultivate the skills that are now required by legal

⁶⁰¹ The LETR has noted that the level of change across the justice system has profound implications for law school graduates. It has also noted that the demographic profile of the law student body has also undergone many changes, since 1989 the number of female graduates and trainee lawyers has outnumbered the number of males. See: Law Society, ‘Annual Statistical Report 2000’ (Law Society, 2000) para 9.7. < <http://www.lawsociety.org.uk/policy-campaigns/research-trends/annual-statistical-reports/> > The proportion of Black, Asian and Minority Ethnic (BAME) trainees has risen in the last decade. See: Black Solicitor’s Network, ‘Diversity League Table 2013’ (BSN, Law Society and Bar Council, 2013) < <http://satsuma.eu/publications/DLT2013/> > Questions of diversity and social exclusion within the legal profession are often directed towards legal education providers, where it is suggested the root of the problem lies. In response to this, legal apprenticeships through the Chartered Institute of Legal Executives and the government have been pushed. See: Chartered Institute of Legal Executives, ‘Apprenticeships in Legal Services’ (CILEX, 2014) available at <www.cilex.org.uk/study/legal_apprenticeships.aspx>

In England the government programmes are run by the Department for Business, Innovation and Skills, see: <www.gov.uk/government/consultations/future-of-apprenticeships-in-england-richard-review-next-steps>

In Wales they are developed as Skills for Justice run by the Sector Skills Council < <http://www.sfjuk.com/about/nations/justice-sector-in-wales/higher-apprenticeship-in-legal-services-wales/> >

⁶⁰² The Kent Law Clinic enables Kent law students to develop the legal skills required for professional practice by working on legal cases with qualified practitioners.

⁶⁰³ see note 596

⁶⁰⁴ Sanders argues for a socio-legal approach to legal education to foster the appropriate legal ethics within law students and the profession. *ibid*

⁶⁰⁵ Webb voices concerns over the impact of the neo-liberalism agenda on higher education, which is now treated as a private economic good and struggling under the pressure of increasing privatisation and marketization of universities and their funding bodies. This is coupled with increasing pressure to demonstrate student employability to ensure the universities future survival. see note 591

⁶⁰⁶ Hilary Sommerlad, ‘The New “Professionalism” in England and Wales: Talent, Diversity, and a Legal Precariat’ in S Headworth et al (eds), *Rhetoric and Reality* (forthcoming)

employers.⁶⁰⁷ As noted by Rosemary Auchmuty⁶⁰⁸ these changes within the legal curriculum have opened the way for more innovative and imaginative methods of teaching and assessment that could incorporate the distinction between thick and thin concepts as a teaching tool. Auchmuty notes that these changes are what enabled her to incorporate the skills of judgment writing into an assessment as part of a new property law module that was modelled on the feminist judgments project.⁶⁰⁹

The changes within the legal profession are part of much wider changes within society brought on by the rise of capitalism. Law was originally a pre-capitalist craft occupation.⁶¹⁰ There was little outside regulation as the industry relied on self-regulation through collegiality. The partner-run law firms were small enough that every practitioner could in theory one day become a partner.⁶¹¹ Since then law has transformed into a capitalist service industry where the majority of legal professionals (in particular lawyers) are better viewed as employees.⁶¹² The transformation in the legal profession is a reflection of broader socio-economic changes, such as the decline of Keynesian based economic policies and the welfare state and the rise in popularity of free market ideologies.⁶¹³ Sommerlad, Young, Vaughan, and Harris-Short all argue that:

free market ideologies have transformed the profession into one that is thoroughly commercial and market driven, eroding justice and rights in the public discourse of law so that it has become a commodity much like any other. The LSA exemplifies and accelerates this development. Such free market ideologies are also seen in higher education: the rise in student fees; and, for law in

⁶⁰⁷ I have undertaken teaching within a variety of modules – A Critical Introduction to Law, English Legal Institution and Methods, and Critical Approaches to Law – that aim to close this gap.

⁶⁰⁸ Rosemary Auchmuty, 'Using feminist judgments in the property law classroom' (2012) 46 (3) *The Law Teacher* 233

⁶⁰⁹ *ibid*

Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010)

⁶¹⁰ Sommerlad discusses the modernization of working processes within law firms towards becoming capitalist entities who are increasingly concerned with the mass production of law as a 'legal product' than law as an individualised service run through partner-centric law firms. See: Hilary Sommerlad, 'Managerialism and the Legal Professional: A New Professional Paradigm' (1995) 2 *International Journal of the Legal Profession* 159

⁶¹¹ Traditional law firms and barristers' chambers have been likened to 'kinship' networks, see: M Burrage, 'From a Gentleman's to a Public Profession – Status and Politics in the History of English Solicitors' (1963) 3 *International Journal of the Legal Profession* 45

⁶¹² see note 589

⁶¹³ The welfare state is a form of governance that emerged after the Great Depression and the two world wars in response to the political challenges that called for a more socially just society. Keynesian economic based policies encouraged government intervention to create more employment and a fairer distribution of wealth throughout society.

particular, the tensions between employability/vocationality and a liberal arts education.⁶¹⁴

These broader socio-economic changes are also evidenced by the rise in popularity of ‘learning’ as a key topic in political and economic contexts. All societies have a vested interest in education: it equips individuals with the skills and knowledge necessary to flourish as an individual and as a member of a community.⁶¹⁵ The level of education and skills demonstrated by nations, companies and individuals is used as a measure to determine their position within the globalised market and knowledge society.⁶¹⁶ The field of education and the narrower sub-field of legal education, is now sufficiently vast that neither this chapter nor the entire study could possibly provide exhaustive coverage of the relevant philosophical issues (neither has it been my intention to do so).⁶¹⁷ This investigation into the use and usefulness of thick and thin concepts within law now culminates in the present chapter which argues for their relevance within legal education, which in light of the recent legislative changes is now a prominent topic of discussion (and tension) within both academia and the legal profession, with the legal curriculum a particular focus.

Chapter Aims and Argument.

This chapter continues the discussion of thick and thin concepts in law by drawing on aspects from the previous three chapters in arguing for one final way in which thick and thin concepts can be useful within law. Legal education is the final area that this

⁶¹⁴ see note 589 at 4

⁶¹⁵ Plato’s *The Republic* addressed many of the philosophical issues that still concern philosophy of education today. There are multiple editions and translations of this text, the following example includes both notes and an interpretative essay: Allan Bloom, *The Republic of Plato* (Basic Books, 1968)

⁶¹⁶ Learning has always been an important part of the human experience, traditionally it was understood as the acquisition of knowledge and skills, today it covers a much larger field that now includes many different theories of learning with emotional, social and societal dimensions. For a good introduction to the many different contemporary learning theories now available see: Knud Illeris (ed), *Contemporary Theories of Learning* (Routledge, 2009). For some interesting discussions of learning theories within the context of legal education see: Robin A Boyle, ‘Employing Active-Learning Techniques and Metacognition in law School: Shifting Energy from Professor to Student’ (2004) 81 *University of Detroit Mercy Law Review* 1; Elizabeth Mertz, *The Language of Law School: learning to “Think Like a Lawyer”* (Oxford University Press, 2007); Robin A. Boyle and Rita Dunn, ‘Teaching Law Students through Individual Learning Styles’ (1999) 62 *Albany Law Review* 213; Michael Hunter-Schwartz, ‘Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching’ (2001) 28 *San Diego Law Review* 347; Paul L. Caron and Rafael Gely, ‘Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning’ (2004) 54 *Journal of Legal Education* 551; Karl S. Okamoto, ‘Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School’ (1995) 45 (4) *Journal of Legal Education* 498

⁶¹⁷ Randall Curren undertakes such a task and divides the field of education into forty-five subfields, see: R. Curren, *A Companion to the Philosophy of Education* (Blackwell, 2003)

study argues could benefit from attending to the ideas of thick and thin concepts, and the result of this chapter is therefore to extend my thesis argument for the use and usefulness of thick and thin concepts within law, and to illustrate the benefit of (and danger in) using existing literature in parallel disciplines and subject areas.

Moreover, legal education has been addressed last and as a culmination because it adds a practical dimension to the theoretical discussion and argument that has been building gradually throughout this investigation. Also it recapitulates in a new testing ground now familiar ideas that have been introduced in preceding chapters: it draws upon aspects of the meta-ethical literature on thick and thin concepts and the legal literature on thick and thin concepts. Lastly, the topic area is of manifest importance as legal education both shapes the law (influencing future legal practices and reforms) and responds to changing pressures on the law externally and from within.⁶¹⁸

The interaction between the legal system and legal education is really a two way process. On the one hand, a country's legal system determines and shapes the structure and approach of the legal education. On the other hand, legal education influences a country's legal system. Moreover, the interaction between the legal system and legal education reflects the dynamics of progress moving towards professionalism.⁶¹⁹

This chapter draws on this two-way relationship between the legal system and legal education in arguing for the importance of thick and thin concepts in legal education.

The way we teach law (the shape of legal education) has generated substantial academic discussion⁶²⁰ demonstrating widespread differences in ideology between the

⁶¹⁸ I do not address legal reform in this thesis but note that it is a potential avenue for future research.

⁶¹⁹ Jun Zhao and Ming Hu, 'A Comparative Study Of The Legal Education System In The United States And China And The Reform Of Legal Education In China' (2012) 35 *Suffolk Transnational Law Review* 329, 343

⁶²⁰ This can cover a wide variety of issues such as the impact of globalization, for example see: Larry E. Ribstein, 'Practicing Theory: Legal Education For The Twenty-First Century' (2011) 96 *Iowa Law Review* 1649, 1652-53, 1672; Lewis A. Kornhauser and Richard L. Revesz, 'Legal Education and Entry into the Legal profession: The Role of Race, Gender, and Educational Debt' (1995) 70 *New York University Law Review* 829; James R. Faulconbridge and Daniel Muzio, 'Legal Education, Globalization, and Cultures of Professional Practice' (2009) 22 *Georgetown Journal of Legal Ethics* 1335; and Sandra R Klein, 'Comment, Legal Education in the United States and England: A Comparative Analysis' (1991) 13 *Loyola of Los Angeles International & Comparative Law Review* 601. The advantages of clinical experience over university based legal education has always been a source of disagreement, see for example: Erwin Chemerinsky, 'Rethinking Legal Education' (2008) 43 *Harvard Civil Rights-Civil Liberties Law Review* 595, and Judith Welch Wegner, 'Reframing Legal Education's "Wicked Problems"' (2009) 61 *Rutgers Law Review* 867, 867-68. The role of values in legal education, see for example: Sandra Janoff, 'The Influence of Legal Education on Moral Reasoning' (1992) 76

parties to them.⁶²¹ In the argument that follows I shall be making what could be perceived as ideological claims regarding the legal curriculum by arguing for the relevance of the literature on thick and thin concepts within law with a sharp focus on *reform* of legal education, whereas the previous three chapters (and chapter five in particular) were included (in part) to demonstrate that the literature on thick and thin is useful for law because it recognises phenomena that already exist within the legal system and offers an illuminating new voice or articulation for pre-existing legal issues. However, this chapter (like the other chapters in my study) will leave it open as to which is the appropriate account of thick and thin concepts to adopt, and will continue to demonstrate that there is a range of options regarding this issue, not least because this concession to generality is all that is presently necessary to defend my argument that these terms are useful within law.⁶²² More positively and less methodologically, of course, my demonstration that there is value in adopting these analytic tools regardless of how they are cast within the range presently deployed in the philosophical literature, stands as a considerable testament to their robust and hitherto underappreciated value within the discipline.

Chapter Argument.

Thick and thin legal concepts are relevant to legal education in two important ways; i.e., to the method(s) of teaching law and to the ethical values fostered by legal education.⁶²³ Much of legal learning is accomplished through studying the legal statements contained within case law, and as already suggested this body of law

Minnesota Law Review 193; David B. Wilkins, 'Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers' (1993) 45 (6) *Stanford Law Review* 1; Julian Webb, 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) 25 (1) *Journal of Law and Society* 134; and Martha C. Nussbaum, 'Cultivating Humanity in Legal Education' (2003) 70 *University of Chicago Law Review* 265

⁶²¹ Describing the conflicting objectives of legal education, see: Harry T Edwards, 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 *Michigan Law Review* 34; Alex M Johnson, Jr., 'Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice' (1991) 64 *Southern California Law Review* 1231; Duncan Kennedy, 'The Political Significance of Structure of the Law School Curriculum' (1983) 14 *Seton Hall Law Review* 1; Anthony T. Kronman, 'Foreword: Legal Scholarship and Moral Education' (1981) 90 *Yale Law Journal* 955; Chris Langdell, 'Law School Curriculum: A Reply to Kennedy' (1984) 14 *Seton Hall Law Review* 1077; Richard A. Posner, 'Legal Scholarship Today' (1993) 45 *Stanford Law Review* 1647; and Richard A. Epstein, 'Legal Education and the Politics of Exclusion' (1993) 45 *Stanford Law Review* 1607

⁶²² My study focuses on thick and thin concepts, but many of the arguments made throughout this study including those within this chapter could also be applicable to thick and thin descriptions, which are also relevant to the case based method of learning in law.

⁶²³ They may be useful in other ways too, but these are the two areas that I think are most promising for initial research.

contains many uses of thick and thin concepts (chapter five). Understanding the philosophical ideas of thickness and thinness (and the accompanying literature) can be particularly useful for understanding these cases and for the legal method of teaching through cases. In this chapter I argue that thick and thin concepts can be useful philosophical tools within legal education because they can substantially assist case-based teaching and learning, which is a useful teaching aid within many law modules, including legal ethics, which encourages critical reflection upon the nature of legal values and the traditional conception of a legal professional.⁶²⁴

The distinction between thick and thin concepts can be utilised within legal conceptual analysis to investigate the nature of legal values and their role within law. One area where the ethical dispositions of the legal system can be directly influenced is through the ethical values that are fostered in law students (and teachers) by the teaching process (an area also known as legal ethics). The changes the legal system has undergone (see chapter introduction) have challenged the traditional values associated with the legal profession, and the ethical literature on thick and thin concepts (chapters two through four) can be useful in enriching our understanding both of these traditional legal values and of the problems currently grappled with in contemporary legal ethics debates. There is also an underlying premise that runs throughout this chapter, which asserts that all aspects of the legal profession are connected (legal practice, legal education, legal ethics, legal regulation and legal research)⁶²⁵ and therefore the current shifts in the legal landscape will affect and lead to changes in all areas of the legal profession and the substantive law.⁶²⁶

2 – Case-based teaching and learning.

I turn first to the case-method and my argument that thick and thin concepts can be useful philosophical tools because they substantially assist case-based teaching and learning, which supports my overall thesis argument that thick and thin concepts are

⁶²⁴ It is important to note that at no point in this chapter should my discussion of case based learning be taken as an argument for the case-method of learning as the primary or only method of legal learning.

⁶²⁵ This list is not intended to be exhaustive, these are some of the aspects of the legal profession that arise in this chapter.

⁶²⁶ The law changes and alters in line with wider socio-economic, political and moral changes within society, see the articles referenced in notes 617 and 618

useful within law as demonstrated in this chapter in relation to legal education.⁶²⁷ The case-method of teaching draws on the usefulness of examples at facilitating learning, they ‘may facilitate the acquisition of knowledge, either for the example’s author, its reader, or both’⁶²⁸ and are therefore an important learning tool. Whilst much of case-based learning within law utilises real legal cases, it is common practice for teachers to devise legal problem scenarios (fictional cases), both kinds of cases are beneficial learning tools. Eileen John claims that reading fiction can still yield conceptual results: ‘certain fictions add to our comprehension of the conditions of application for a concept or to our understanding of basic competence in using a concept. Comprehending fiction can also expand our conceptual knowledge in broader ways, by showing us that a concept can have a broader or different “domain” or “point” than we previously thought.’⁶²⁹ Cases (both real and fiction) are an important learning tool because they enable students to develop their competency with legal concepts, and as many of these legal concepts can be identified as thick concepts or thin concepts, this establishes their value as a learning tool for developing competence with thick and thin legal concepts.

As my thesis argues for the usefulness of thick and thin concepts within case-led learning, it is helpful to first establish, why case-led learning is considered so useful by many disciplines (such as law).⁶³⁰ Dena Davis suggests the following advantages of case-led learning:

⁶²⁷ The casebook method of learning law through studying the judicial opinions that become the law via *stare decisis*, is the primary method of teaching law in many common law jurisdictions (especially the United States) and was pioneered at Harvard Law School by Christopher Columbus Langdell. Whilst Dean of Harvard Law School from 1870-1895 he applied the principles of pragmatism to the teaching of law, he advanced a dialectical process of learning that came to be called the case-method, which encouraged students to use their own reasoning powers to deduce how the law might apply in a particular case.

For further reading on this see: Anthony Chase, ‘The Birth of the Modern Law School’ (1979) 23 (4) *American Journal of Legal History* 329; Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (Routledge, 1992); Bruce A. Kimball, *The Inception of Modern Professional Education: C. C. Langdell, 1826-1902* (University of North Carolina Press, 2009); Bruce A. Kimball, “‘Warn Students That I Entertain Heretical Opinions, Which They Are Not To Take as Law’: The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883” (1999) 17 *Law and History Review* 57; and William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (Oxford University Press, 1994)

⁶²⁸ Heidi Li Feldman, ‘Beyond the Model Rules: The Place of Examples in Legal Ethics’ (1998) 12 *Georgetown Journal of Legal Ethics* 409, 416

⁶²⁹ *ibid* at 423

For further discussion of John’s ideas see: Eileen John, ‘Reading Fiction and Conceptual Knowledge: Philosophical Thought in Literary Context’ (1998) 56 *Journal of Aesthetics and Art Criticism* 331, 333

⁶³⁰ For example see: Roger B. Dworkin, ‘Emerging Paradigms in Bioethics: Introduction’ (1994) 69 *Indiana Law Journal* 945 who argues for the importance of cases in bioethical analysis, Dworkin also notes their importance in ethical and legal learning.

First, a good case can serve as an indispensable tool for teaching theory, useful for class discussions and exam questions.... A second use for cases is to provide a pool of shared experience (if only second hand), a fixed point for discourse in the profession...Third, by describing real experiences ethicists can make points and draw conclusions while inviting their readers to make their own independent judgements.⁶³¹

In law, cases serve an additional role, because it is through judicial decisions that the body of case law is generated. In all four roles (Davis's three and the additional feature brought by law) an understanding of thick and thin can have a significant impact that can now be given substance. I now turn to consider Davis' claims in more detail. Her first claim asserts the role of cases in teaching law as an illuminating way of not only teaching students about legal judgements and decisions, but also in bringing legal theory to life. The following example helps to demonstrate the validity of her claim. Eric Wiland argues that REASONABLE is a thick concept⁶³² and notes the involvement of this thick concept in the development of the 'reasonable' man test. He states:

The reasonable person standard governing appropriate care emerged specifically from English common law; it has not always existed, and it does not exist everywhere. We first see it in the case of *Vaughan v. Menlove* (1837), in which the court ruled that liability for negligence depends not upon the details of the defendant's state of mind, but instead upon the standard of caution that "a man of ordinary prudence would observe." In 1856, the English courts again reaffirmed that "negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would do" (*Blyth v. Company Proprietors of the Birmingham Water Works*).⁶³³

Whilst most students are generally led to believe that the law does not punish omissions there are certain exceptions to this general rule of thumb and these exceptions can be determined through application of the reasonable man test. Interpreting and applying the reasonable man test employs practical reasoning skills, which depend heavily on competency with legal concepts. If the legal concepts in

⁶³¹ Dena S. Davis, 'Rich Cases The Ethics of Thick Description' (1991) 21 (4) *The Hastings Centre Report* 12, 12-13

⁶³² Eric Wiland, 'Williams on Thick Ethical Concepts and Reasons for Action' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press, 2013), 210

⁶³³ *ibid* at 212

question are thick concepts (such as REASONABLE) then it is important that legal education equips individuals with the skills to understand and engage with all kinds of legal concepts, including thick concepts. Especially if, the thick concept e.g., REASONABLE, directly informs and shapes the legal criteria – the reasonable man test – which in turn informs and shapes the legal doctrine of negligence (negligent omissions in this particular case).⁶³⁴ Studying thick concepts such as REASONABLE, which are used as legal criteria by the judiciary when deciding legal issues can reveal the nature of legal concepts - how specific (often thick) legal concepts play an important role within the common law development of legal doctrine - this can in turn usefully illuminate the nature of law and the philosophical, political and economic commitments that operate beneath the surface of the common law. The above brief example also therefore demonstrates how the case-method of teaching and thick concepts when combined helps to clarify the theoretical construct of a reasonable man, which can be particularly hard to grasp as it has been developed and honed over many judicial decisions (all of which reflect deeper theoretical commitments regarding the nature of law); and the legal process of common law adjudication and doctrinal development.

The second use of cases identified by Davis – providing a pool of shared experience – indicates the ability of cases to reveal the social aspect of law and the relations between the individuals involved in the practice. Consider for example the law on assisted suicide, an area of law that clearly invokes ethical as well as legal considerations. Richard Nobles and David Schiff discuss the role of the thick concept CIVIL DISOBEDIENCE in the *Purdy* case⁶³⁵ and note the judges’ use of legal theory in their discussion of the thick term ‘civil disobedience,’ which demonstrates a significant departure from the traditionally descriptive nature of legal judgments.⁶³⁶ The negative values associated with disobedience align with the judges reluctance to identify a right to disobey the law, even if this was only in limited circumstances. Case-led learning utilises legal judgments, such as Lord Hope’s, which deploy thick concepts such as DISOBEDIENCE in their reasoning and studying the thick concepts deployed within those judgments, highlights the social aspect of law and the role of the judiciary in deciding matters of social justice. Fostering an understanding of thick concepts is

⁶³⁴ ‘Negligence’ is also a thick concept and is used as an example twice, later on in this chapter.

⁶³⁵ Richard Nobles and David Schiff, ‘Disobedience to Law – Debbie Purdy’s Case’ (2010) 73 *Modern law Review* 295

⁶³⁶ *ibid* at 301

therefore important to developing awareness of social justice and the social movements these thick concepts feature within. Joel Ngugi argues that the THE RULE OF LAW is deployed as a thick concept within rule of law projects, because it has ‘a powerful emotive appeal by implicitly linking values with action. By juxtaposing facts and values, the thick conception of the rule of law is an effective tactic for the successful mobilization of public opinion by appeals to conscience that call on value.’⁶³⁷ He argues that social movements often use thick concepts to influence ‘peoples’ way of viewing particular political choices as ethical by ensconcing them in ethical values.’⁶³⁸ These wider political movements also impact upon the ethos of law and suggest the relevance of thick concepts to legal ethics.

As Davis notes studying legal judgments (which I argue includes the thick concepts deployed within these judgments) also helps to clarify the relations between various legal actors within the legal profession e.g., the relation between the judiciary and the legislature. For example, in the *Purdy* case the legislature and the judges seem to be in conflict, the judges were clearly governed by statute, yet their judgments also attended to the legal values and social values that influence legal principles, such as - the sanctity of life and the harm principle – studying their legal reasoning and the concepts they use helps to identify the relationship between the judiciary and the legislature in complex cases. The complexity of the legal issues addressed by this case indicate why Lord Hope’s judgment concluded that the DPP must produce specific guidelines ‘which make it clear when at least some persons who breach section 2 (1) (he thought it would be a narrow category) would not be prosecuted.’⁶³⁹ Hope’s statement reflects the conflicting relation between the legislature and the judiciary in this particular case (and also between the statute and wider legal principles), because as Nobles and Schiff argue, it is hard to describe his process of reasoning as anything other than an act of “decriminalisation”⁶⁴⁰ despite his claim that the law remained unchanged in light of his judgment. Studying the relations between the judiciary and the legislature is also of interest to legal ethics (I address this in the next section).

⁶³⁷ Joel M. Ngugi, ‘Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse’ (2005) 26 (3) *Journal of International Law* 514, 557

⁶³⁸ *ibid*

⁶³⁹ see note 632 at 302

⁶⁴⁰ *ibid*

The above examples demonstrate that ‘real’ cases are ‘long, richly detailed, messy, and comprehensive,’⁶⁴¹ this is also evidenced by the thickness of the concepts that are often employed within these cases. The third role described by Davis is quite specific to ethicists, but can still actually be relevant to legal theorists. Law is meant to be non-retroactive and policy makers when trying to formulate new laws or improve current laws have to try to envisage the possible applications of their ideas (it is very hard to conceive of every possible situation in advance). Case law deals with real experiences; it is more closely connected to our social world than theoretical accounts and abstract universalisations, which necessarily have to form the basis of statute based law.⁶⁴² Cases are a better reflection of the social world, because they provide a thicker account of the practices and values of that society, which (as already discussed in chapter four) is also one of the advantages Williams attributes to thick concepts.

The above discussion of the merits of case-led learning within law has utilised case examples that involve thick concepts to demonstrate their occurrence within case law and therefore their relevance to the case-method of teaching, but as yet has failed to offer any significant argument or demonstration (based upon the thickness of these concepts) as to how these concepts could be incorporated into legal curriculums and utilised within legal education. This has been intentional and important to the structure of my argument within this chapter. The previous three chapters laid important ground work in establishing the existence of thick and thin concepts within law, including case law, therefore this chapter proceeds on the assumption that the existence of thick and thin concepts within legal cases has already been established (at least to a sufficient extent that can justify further investigation of their usefulness). As this chapter makes what could be perceived to be ideological claims regarding the legal curriculum – that thick and thin concepts due to their use within case law and potential usefulness when deployed alongside the case-method of teaching, should be included within the legal curriculum - it has been important to first establish the significance of the case-method, before proceeding to argue that thick and thin concepts can be useful philosophical tools which substantially assist in case-led teaching and learning. The following

⁶⁴¹ see note 628 at 13

⁶⁴² This directly relates to Williams’ argument that explanations of our social practices (he has ethics in mind), have to take into account the perspectival nature of those practices (by this he does not mean differences in opinions) and the evaluative standpoint of the practice. See my earlier discussion of Williams (chapter four) for more detailed discussion of this argument.

section explores the connection between cases and thick concepts in more detail through a discussion of their potential uses within the legal curriculum.

3 - Thick and thin concepts within cases.

Reforming the legal curriculum in such a manner that facilitates the development of competency with thick and thin legal concepts is a valuable enterprise that has implications for our understanding of the current law and the development of future law. The prominence of the case-method of learning and the use of thick and thin concepts by judges within their legal judgments provides a starting point from which to explore further the distinction between thick and thin concepts. The following section suggests how developing a competency with thick and thin concepts could be incorporated into the legal curriculum via the case-method of learning and could aid in the teaching and development of legal concept competency, which is essential to not only understanding the law but also to developing the skills of practical deliberation required for participation within the practice of law. To demonstrate how the case-method of teaching can be developed in innovative and interesting ways and therefore how the distinction between thick and thin concepts could be incorporated into the curriculum via the case-method of teaching, this section uses the example of the feminist judging project and its incorporation into law school teaching.⁶⁴³ This exemplar also serves to facilitate discussion of my own experiences of teaching undergraduate law.

Practical deliberation.

Case-led teaching and learning helps to foster the skills required for practical deliberation - it aims to teach the future lawyers not just what the law actually is, but how to determine what the law actually is, and, moreover, to construct compelling arguments that conclude what the law actually is, the use of cases in legal education in some respects is a lesson in comprehending, arguing and deciding cases – these same skills are required when the legal concepts involved in practical deliberation are thick/thin legal concepts. In fact many of the concepts that are regularly deployed

⁶⁴³ Rosemary Hunter, 'Introduction: feminist judgments as teaching resources' (2012) 46 (3) *The Law Teacher* 214-226

during practical deliberation are thick legal concepts, because these concepts tend to be ethically rich (laden with value). Developing competency with thick and thin legal concepts therefore becomes integral to practical deliberation. The need to develop competency with thick and thin concepts for the purposes of practical deliberation has been noted by Roger Dworkin (a bio-ethicist) and Iris van Domselaar (a virtue ethicist). They argue that legal education should pay special attention to thick and thin concepts within legal cases and seek to develop the conceptual skills required to engage with these concepts because of their relevance to the case-method of learning and practical deliberation. Dworkin notes: ‘cases are a way to learn how to perceive, comprehend, and judge ethically. Their use develops skills in moral diagnosis, discernment of particularities, analogical reasoning, judicious weighing and balancing, and practical strategies for coping with risk and judicial uncertainty.’⁶⁴⁴ Developing these skills through case-led learning should be of particular concern to law students and educators, because these are many of the skills required by the legal profession, in particular the judiciary who are expected to demonstrate this kind of knowledge, when deciding cases.⁶⁴⁵

It is possible to combine an argument for the inclusion of thick and thin concepts within the legal curriculum with a particular political ambition or to advance a particular pedagogy, but that is not my intention in this thesis. For example Domselaar’s calls for reform of the legal curriculum to include attention to thick and thin concepts is tailored to her ‘virtue-centred approach to adjudication,’ but her arguments can be extrapolated and applied to a more general argument for reform of the legal curriculum. Domselaar argues for a ‘virtue-centred approach to adjudication’ that fosters the judicial virtues such as ethical perception that are employed when engaging with thick legal concepts.⁶⁴⁶ She cites ‘RACISM, COURAGE, POVERTY, NEGLECT, HONESTY, and VIOLENCE’⁶⁴⁷ as examples and advances a non-separationist understanding. She argues that the legal education institutions need to foster judicial virtues such as ethical perception that enable students to engage with the evaluative standpoint of thick concepts.

⁶⁴⁴ Roger B. Dworkin, ‘Emerging Paradigms in Bioethics: Introduction’ (1994) 69 *Indiana Law Journal* 945, 949

⁶⁴⁵ Chapter seven already demonstrated that many of the shared core philosophical concerns of law can be seen in the jurisprudential debates surrounding the judiciary. The method of teaching law through cases brings many issues associated with the judiciary to the forefront of legal education.

⁶⁴⁶ Iris van Domselaar, ‘Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship’ (2015) 44(1) *Netherlands Journal of Legal Philosophy* 24, 29

⁶⁴⁷ *ibid*

The usefulness of including thick and thin concepts within the legal curriculum stems in part from their ability to highlight the interplay between evaluation and description within legal concepts and bring to the forefront the wider jurisprudential issues that are often buried beneath the surface in cases. Once these jurisprudential issues are brought to the surface of a case, students begin to understand the complexity of the practical deliberation required to reach that particular judgment and can begin to take a critical, questioning stance regarding the law. Thick and thin concepts can therefore not only facilitate the development of legal skills such as reading cases, they can also foster a critical approach towards law. Research in US law schools has noted how the more successful students ‘question court decisions, evaluate the results of cases, and consider the implications of rules. Reading the law is far more than making notes or highlighting text. We want our students to read the law creatively and critically.’⁶⁴⁸ Despite the traditional doctrinal nature of law many law schools are now offering critical modules such as ‘Critical Introduction to Law’ offered at the University of Kent and ‘Critical Approaches’ offered at the University of Canterbury Christchurch. Having taught on both these modules it was interesting to notice that most students are initially resistant to critical approaches to law and recognising the role of evaluation within law (and legal concepts), despite their (albeit unknown) exposure to thick and thin concepts within legal cases, particularly appellate case-law.

Studying appellate adjudication is crucial to the case-method and also usefully highlights key features of thick concepts – their flexibility and malleability – that adds to their usefulness within law. Understanding appellate adjudication as the engineering of thick (entangled) legal concepts both explains and justifies why appellate cases have proven to be an enduring part of the law school curriculum, therefore I return to the work of Heidi Feldman (see chapter seven), to demonstrate the usefulness of thick and thin concepts within legal education regarding the teaching of the appellate adjudication process which plays a major role in the development of the common law.⁶⁴⁹ Feldman cites *MacPherson v. Buick Motor Co.*⁶⁵⁰ as an example of appellate

⁶⁴⁸ Leah M. Christensen, ‘Legal Reading and Success in Law School’ (2006-7) 30 *Seattle University Law Review* 603 at 646

⁶⁴⁹ The following articles have already been noted in the earlier discussion (chapter seven) of Feldman’s work on thick concepts in law, see: Heidi Li Feldman, ‘Appellate Adjudication as Conceptual Engineering’ in Graham Hubbs & Douglas Lind (eds), *Pragmatism, Law and Language* (Routledge, 2014); Heidi Li Feldman, ‘The Distinctiveness of Appellate Adjudication’ (2012) 5 *Washington University Jurisprudence Review* 61; Heidi Li Feldman, ‘Blending Fields: Tort Law, Philosophy and

engineering of thick legal concepts to defend the importance of both the case-method and thick concepts within legal education.

When law students study this case, they learn that it stands for the elimination of the privity requirement (the requirement of a contractual or quasi-contractual relationship) between an injured plaintiff and a maker of a defective product that injured him or her. For the purposes of the development of the law of products liability, this take-away makes sense. But from the perspective of how New York's highest court reached its conclusion, this future oriented understanding is anachronistic. Looking forward from Cardozo's opinion, rather than backward to its particular underpinnings, misses some significant data important for understanding the engineering of entangled concepts.⁶⁵¹

Cardozo dispensed with IMMINENT DANGER and INHERENT DANGER so as to better engineer NEGLIGENCE, a concept better suited to the emergence of mass production within industry. The case ultimately demonstrated that the concept IMMINENTLY DANGEROUS was inadequately structured to specify the situations in which 'privity' was inapt and liability should be found; and that 'imminent danger' could not mediate the tension between the two thick concepts PRIVACY and NEGLIGENCE. Cardozo who gave the majority judgment never referred to the 'inherent danger'/'imminent danger' distinction which had been the central focus of the defendants argument throughout all phases of the trial, instead Cardozo used a series of cases to demonstrate that the courts are always applying the principle that where there is foreseeable danger there is a duty placed upon the creator to avoid injury to persons even if they are not the immediate purchaser of the item. His judgment therefore developed a conception of duty in relation to manufactured goods that sets aside the privity limitations.

Cardozo's holding accomplishes two things. First, he abolishes the privity limitation. Second, he abolishes the need for the concepts of 'imminent danger' and 'inherent danger'. Rather than try to shore up either or both, he dispenses with the pair in favour of engineering

Legal Theory' (1998) 49 *South Carolina Law Review*, 167 and Heidi Li Feldman, 'Objectivity in Legal Judgment' (1994) 92 (5) *Michigan Law Review* 1187

Feldman uses the term 'entangled' legal concept to refer to legal concepts that blend evaluation and description (thick concepts) in such a manner that renders these two aspects of the concept incapable of separation (disentanglement). Feldman argues that judges engineer entangled legal concepts sometimes in their legal decisions. See chapter seven for a more detailed discussion of these ideas and her work.

⁶⁵⁰ *MacPherson v Buick Motor Co.* (1916) 217 N. Y. 382

⁶⁵¹ Heidi Li Feldman, 'The Distinctiveness of Appellate Adjudication' (2012) 5 *Washington University Jurisprudence Review* 61, 67

negligence's duty of care with a focus on foreseeable, knowable risk.⁶⁵²

Cardozo's re-engineering of 'negligence' eventually led to its demise in deciding liability for manufacturing defects, as future courts used more apt thick concepts to replace NEGLIGENCE and instead introduced the principles of liability without fault. Coming to understand how thick legal concepts such as NEGLIGENCE are engineered 'even explicitly engaging in reverse engineering, is not only an intriguing intellectual exercise, it is also instruction in a craft, perhaps even an art, uniquely performed by lawyers.'⁶⁵³ The engineering of thick concepts within cases provides further support for the need to develop a competency with thick and thin concepts as part of the legal curriculum. As noted above this ambition could be incorporated into the legal curriculum via the case-method of learning. Discussion now turns to the feminist judging project and its incorporation into law school teaching, because this innovative project provides an example of how the theoretical aspects of this thesis could be applied practically as a learning tool.⁶⁵⁴

The feminist judging project.

The feminist judging project involved the writing of alternative feminist judgments in significant legal cases⁶⁵⁵ and has inspired the use of feminist judgments as a teaching resource.⁶⁵⁶ Law school modules that have sought to employ feminist judgments as a teaching tool require students to reflect upon the differences between the original judgment and the feminist judgment. Such reflection aims to foster critical thinking, 'emphasising the various ways in which law may be questioned rather than taken for granted, evaluated rather than simply learnt, and considering how a critical, feminist approach may be brought to bear, while also being concerned to take a critical, questioning stance in relation to the feminist project itself.'⁶⁵⁷ Whilst the use of feminist judgments as a teaching tool may be part of a political project of feminist pedagogy this is not their only possible use, the judgments may also be used by

⁶⁵² *ibid* at 94

⁶⁵³ *ibid* at 105

⁶⁵⁴ The teaching materials developed from the feminist judging project are available online at <http://www.feministjudgments.org.uk>

⁶⁵⁵ Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010)

⁶⁵⁶ Rosemary Hunter, 'Introduction: feminist judgments as teaching resources' (2012) 46 (3) *The Law Teacher* 214-226

⁶⁵⁷ *ibid* at 225

educators who do not share these broader political goals but instead wish to teach students to question the nature of legal reasoning and the development of legal doctrine. My own experience of the use of feminist judgments as part of my teaching at Kent in the 'Critical introduction to Law' module highlights how an understanding of the distinction between thick and thin concepts could have better equipped students to reflect upon the differences between the original judgment and the feminist judgment. Reading cases through a thick-thin lens enlivens the legal narratives and wider ethical, political, and socio-economic concerns that influence judicial decision-making. Understanding thick and thin concepts enables students to grasp the role of evaluative standpoint within legal cases and appreciate how the evaluative aspect of legal concepts can affect the outcome of a legal case, this new knowledge can then be put to use when comparing and contrasting the original and feminist judgments. Identifying the thick and thin concepts employed by both the original and feminist judgment offers a starting point from which to compare and contrast the two judgments and may help students understand how two differing outcomes could be arrived at from the same set of legal facts. Rosemary Auchmuty argues:

Good lawyers know that there may be many ways to reach the 'right' result and there may be disagreement as to what the right result might be. Disputes presuppose at least two sides to the question and judges must choose, sometimes by exercising a moral judgment, not just a simple application of rules. Law, and even facts, can be manipulated to serve desired ends. Reading cases reveals all this. It makes law much more complicated, but it makes it come alive. If we want our students to understand legal method, and to learn to think like good lawyers, there are few more useful skills for them to acquire than the skill of reading cases.⁶⁵⁸

Identifying and examining the role of thick and thin concepts within legal judgments provides another opportunity for students to acquire and develop the skill of reading cases. The usefulness of thick and thin in developing legal skills such as reading cases and practical deliberation further supports their inclusion within legal education.

Developing the skills associated with reading cases is particularly difficult because although teachers may be keen for students to read cases, the reality is that many students do not read cases and instead rely on case summaries found in textbooks. The

⁶⁵⁸ Rosemary Auchmuty, 'Using feminist judgments in the property law classroom' (2012) 46 (3) *The Law Teacher* 227, 233

arrival of new kinds of textbooks and learning resources that make it possible for students to complete an undergraduate law degree based entirely on these textbooks and associated websites has meant that for many students it becomes their sole resource. This means that students not only lack the skills developed by reading cases and articles, but further than this it is easy to see why these students:

find it hard to grasp the reasoning behind a given judgment, to imagine the possibility of a different response to the same set of facts, or to distinguish a case on its facts – because the facts they read in the summary are often so brief and diluted as to mask all essential distinctions. It's no wonder they remain unaware of dissenting judgments, lines of reasoning that have been abandoned (and why) and alternative (often better) reform proposals that have never been enacted (and why), and that they fail to appreciate the complex negotiation of facts and law that goes into a routine decision, let alone a landmark one.⁶⁵⁹

This became particularly noticeable when teaching Equity and Trusts at Kent where students favoured the textbook case summary over the required case reading and then struggled to partake in seminar discussions concerning details of the case and its wider implications for Equity and Trusts Law.⁶⁶⁰ Thick and thin concepts can be found within both cases and textbooks but they serve very different purposes. Textbooks often start with thinner concepts that are then fleshed out through the use of case summaries and example problems,⁶⁶¹ whereas as noted earlier in this chapter cases revolve around key thick concept(s) such as NEGLIGENCE that are then applied to the facts of the case maybe with the additional support of thinner concepts such as HARM. In light of this observation it is interesting to reflect upon the order in which thick/thin concepts are taught and whether this is indicative of a priority of the thin over the thick (or vice versa).⁶⁶² My own experiences as both a student and educator have taught me that it is the thinner concepts due to their vagueness and lack of detail that are harder to grasp, in comparison to thicker concepts which are more detailed and specific making them easier to grasp and apply. I have observed that students respond better to topics

⁶⁵⁹ *ibid* at 232

⁶⁶⁰ This was in stark contrast to my experience of a Critical Introduction to Law where there were allocated readings, but there was no textbook.

⁶⁶¹ For example Brian Orend's introductory text to human rights is split into two parts – part one: concept and part two: context – he begins with the basic core concepts such as HUMAN and RIGHT and then in the latter part of the book expands upon these notions through examples. Brian Orend, *Human Rights: Concept and Context* (Broadview Press, 1971)

⁶⁶² In chapter four I note Williams' criticism that ethics has focused too much on the thin even though the thick offers more action. It would be interesting to consider whether legal education asserts (intentionally or unintentionally) a thick or thin priority.

and reading that revolves around thicker concepts and that it is not until the thinner concepts are supported by examples of application, that students can begin to grasp these vaguer concepts. The incorporation of feminist judgments into legal education through critical modules such as ‘Critical Introduction to Law’ provides a testing ground for students to explore their understanding of both thick and thin legal concepts and build their competency with both thick and thin concepts. It also creates an opportunity for teachers to observe students responses to thick and thin concepts, and stimulates dialogues regarding student learning and responses to thick and thin legal concepts. Considering legal concepts through a thick/thin lens not only illuminates a difference in approach between textbooks and cases, but it facilitates a wider dialogue regarding the decline of cases and rise of textbooks as a key learning tool, and how to orient the case-based method of teaching within this changing learning environment.

Although the above discussion has predominantly addressed thick concepts this should not be construed as an argument for or implication that it is only thick concepts that are of relevance to legal education. Investigating the potential thickness or thinness of concepts employed by legal professionals within cases and statutes, demonstrates the wide spectrum of evaluations and descriptions conveyed by the law; and a legal education that recognises the usefulness of both thick and thin concepts within case-led learning will stand a better chance at defending the value of the case-method within the legal curriculum.

The incorporation of feminist judgments into legal education through critical modules is one example of the innovative methods of teaching the law that are becoming increasingly popular and demonstrates one possible area of application for thick and thin concepts within the legal education. This section has argued for the usefulness of thick and thin concepts within the case-method of instruction, and as such offers a partial defence of this educational tool that has received critical attention within law. Interestingly contemporary ethical analysis has advocated the adoption of the common law method (that is, the case-method), and scholarship in ethics has recognised that the case-method of instruction helps to capture the thickness and diversity of social practices such as ethics, and this argument could be used to defend the use of the case-method in law which is also a social practice.⁶⁶³ The following section will continue to

⁶⁶³ Bernard Williams, ‘Afterword What Has Philosophy to Learn from Tort Law?’ in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995)

demonstrate the relevance of thick and thin concepts within legal education in relation to the methods of teaching law (the case-method of instruction), but with a particular focus on legal ethics.

4 - Legal Ethics and Legal Values.

The second half of this chapter considers one other area, already trailed, that has also received critical attention in response to the recent changes within the legal system and, for example, the LETR'S findings: legal ethics.⁶⁶⁴ Legal ethics has been highlighted as an emerging area of law that needs to be fostered by legal curricula in their response to the LETR and changes within the legal profession and thick and thin concepts have been recognised as relevant to legal ethics.⁶⁶⁵ It is important to introduce and elucidate the subject matter of legal ethics, because as Alice Wooley notes 'philosophical legal ethics exists at the intersection between the abstraction of philosophy and the tangible problems of the real world.'⁶⁶⁶ Wooley asks the following question to highlight the multi-faceted nature of legal ethics and therefore the multi-faceted concerns it must necessarily address: 'Is the concern of legal ethics the morality of lawyers, the morality of clients, or the morality of law?'⁶⁶⁷ This section considers the usefulness of thick and thin concepts in addressing the morality of law and the morality of lawyers.

The first possible application of thick and thin concepts within legal ethics concerns the morality of the law, because accepting the existence of thick and thin concepts within law provides the opportunity to rethink the nature of legal values and their role within legal education. As noted throughout chapters five, six and seven there are

⁶⁶⁴ See the following examples: Frances Lee Ansley, 'Race and the Core Curriculum in Legal Education' (1991) 79 (6) *California Law Review* 1511; Geoffrey C. Hazard Jr., 'Curriculum Structure and Faculty Structure' (1985) 35 (3) *Journal of Legal Education* 326; Rosemary Auchmuty, 'Agenda for a feminist legal curriculum' (2003) 23 (3) *Legal Studies* 377; Roy M. Mersky, 'Legal Research versus Legal Writing within the Law School Curriculum' (2007) 99 *Law Library Journal* 395; Jaakko Husa, 'Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind' (2009) 10 (7) *German Law Journal* 913 and Jeffrey S. Lehman, 'International Law and the Legal Curriculum' (2002) 96 *American Society of International Law Proceedings* 55

⁶⁶⁵ David Luban, *Lawyers and Justice: an Ethical Study* (Princeton University Press, 1988); David Luban (ed), *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (Rowman & Allanheld, 1983); Philip B. Heymann and Lance Liebman, *The Social Responsibilities of Lawyers: Case Studies* (Foundation Press, 1988)

⁶⁶⁶ Alice Wooley, 'The Legitimate Concerns of Legal Ethics' (2010) 13 (2) *Legal Ethics* 168, 168-169

⁶⁶⁷ *ibid* at 168

many examples of thick concepts within law all of which contain an evaluative or normative commitment that could also be referred to as a ‘thick’ value, consider for example the various criminal offences MURDER, RAPE, THEFT and MANSLAUGHTER (Chapter five) LEGAL VALIDITY (chapter six) and NEGLIGENCE (chapter seven). The distinction between thick and thin concepts and the accompanying literature can be utilised within legal conceptual analysis (as demonstrated by chapter six in relation to the thick term ‘legal validity’) to illuminate our understanding of specific thick legal concepts, which can assist the legal ethics project in illuminating our understanding of legal values (such as the thick values associated with ‘legal validity’)

The role of thick and thin concepts in understanding legal values was noted by the 1998 Conference of the Clinical Section of the Association of American Law Schools on “values”.⁶⁶⁸ Topics under discussion were: ‘what values law professors hold, how they might differ from those of their students, whether it is appropriate to “teach” about values, whether it is even possible not to teach about them, how to discuss values in a non-threatening fashion, whether some values might simply be wrong, and so forth.’⁶⁶⁹ Tremblay defends the importance of legal values within legal education, but argues that we need to rethink the role of values within legal education, particularly legal ethics. He opines:

The philosophers say that we err when we think that values are separate from facts. We tend to think that we “have” values, that we *possess* them, and we then use, or apply, or reflect those values when we encounter situations in the world...The philosophers tell us that the fact/value distinction is false. Moral sensibility arises from the experience of and action upon concrete circumstances. I do not have “values” as much as I “experience” values when I encounter others. It is therefore not helpful to talk about teaching or imposing or indoctrinating values, because values are not something that you have or do not have, outside of specific contextual interactions.⁶⁷⁰

Despite intense and lively discussions at the conference, there was a lack of resolution about the role of values in education (although the conversations were positively

⁶⁶⁸ The conference was held in Portland, Oregon, the following account of the conference is provided by Paul Tremblay Associate Clinical Professor at Boston College Law School who discusses the conference and its findings in his: Paul R. Tremblay, ‘Coherence and Incoherence in Values-Talk’ (1999) 5 *Clinical Law Review* 325. This includes a sample of the ideas collected by the conference organizers from small group work, attendees were asked ‘what are our values?’ the responses are noted in the footnotes of his article on the conference: *ibid*

⁶⁶⁹ *ibid*

⁶⁷⁰ *ibid* at 329-330

viewed as a significant normative statement) because a more careful (coherent) understanding of the term ‘values’ was needed.⁶⁷¹

Tremblay suggests that the common misunderstandings about the role of values in lawyering (and behaviour in general) are symptomatic of wider misunderstandings that are so deeply embedded we struggle to recognize them, writing; ‘values-talk rests on an assumption that we do not have a shared, substantive, theoretical framework telling us what is good, and, reciprocally, what is bad.’⁶⁷² The search for a shared evaluative language to discuss values animated this conference which, in Tremblay’s view is capable of being captured by ‘the thick theory of the good’ (whilst also raising helpfully the philosophical distinction between fact and value).⁶⁷³ He elaborates: there will be disagreements but if we instead work on identifying the instances where we agree (there will always be agreement at some level), then a coherent conversation using common language can occur with the possibility of closure. Williams’ thick concepts are dependent upon the notion of a shared evaluative standpoint, which supports the idea that there will always be at least some ethical agreement, he argues that meaningful legal ethical discourse presupposes a quasi-descriptive vocabulary, and that the profession needs to cultivate professional dispositions amongst its practitioners that incorporate a sustainable degree of professional reflectiveness (ethical reflectiveness).⁶⁷⁴ Legal education’s role in fostering professional reflectiveness through legal ethics courses highlights the second possible application of thick and thin concepts.

The morality of Lawyers.

As Tremblay notes above there is widespread disagreement regarding the role of values within legal education and this is partly due to disagreement over how to teach legal ethics. Linda Haller recognises the difficulty of teaching legal ethics and suggests that legal cases, an already respected learning tool, if read through a legal

⁶⁷¹ *ibid* at 326

⁶⁷² *ibid* at 328

⁶⁷³ Tremblay notes that the idea of ‘thick’ and ‘thin’ theories can be traced to John Rawls who advanced a ‘thin’ notion of process to defend his theory of justice, despite criticisms that ‘thick’ sentiments underlay his arguments. See: John Rawls, *A Theory of Justice* (Harvard University Press, 1971) and Michael Sandel, *Liberalism and The Limits of Justice* (Cambridge University Press, 2nd edition, 1998), 24-28

⁶⁷⁴ Bernard Williams, ‘Professional Morality and Its Dispositions’ in David Luban (ed), *The Good Lawyer: Lawyers’ Role and Lawyers’ Ethics* (Rowman & Allanheld, 1983)

ethics lens rather than a doctrinal reading could prove useful.⁶⁷⁵ For example, reading cases through a legal ethics lens encourages ethical reflection upon the nature of legal values and critical self-reflection upon the students' own values.⁶⁷⁶ It can also facilitate discussion concerning the morality of lawyers, which is one of the primary concerns of legal ethics (this concern was also noted by many of the responses to the LETR cited within this chapter). The following argument for the usefulness of thick and thin concepts within legal ethics will therefore draw upon my earlier discussion of the case-method as a learning tool that facilitates practical reasoning with thick legal concepts.

Haller does not enter the debate over whether fictional or real cases are a better teaching tool within legal ethics.⁶⁷⁷ As many teachers will only have reported appellate decisions to work with, the following discussion utilises *Walmsley v. Cosentino*⁶⁷⁸ as an exemplar. The case provides a valuable vehicle through which to explore the morality of the legal professionals involved and the thick values that the case rested upon, which as noted earlier will require an understanding of thick and thin concepts.

*Walmsley*⁶⁷⁹ is a common law professional negligence case - the solicitor was being sued for professional negligence for not issuing court proceedings relating to a personal injury claim arising out of a motor vehicle accident within the limitation

⁶⁷⁵ Linda Haller, 'Coming to terms with legal ethics assessment' in Michael Robertson, Lillian Corbin, Kieran Tranter and Francesca Bartlett (eds) *The Ethics Project in Legal Education* (Routledge, 2011), 191-211

⁶⁷⁶ Martha Nussbaum notes the danger of legal actors (students, teachers and lawyers) losing their ability to empathise with clients and engage in critical self-reflection. Cases can be a useful teaching tool for demonstrating the indoctrination of first year law students, because if asked to read a law report students will automatically adopt a doctrinal approach and pick out the legal principles and report the case ratio, it is only when they are asked to be alert to the broader ethical issues upon a second reading that students will identify the ethical stories within the case. This can be a shocking yet powerful learning tool for students and lead to interesting classroom discussions concerning their earlier oversights. M. Nussbaum, 'Cultivating humanity in legal education' (2003) 70 *University of Chicago Law Review* 272

⁶⁷⁷ Carrie Menkel-Meadow and Bruce Green both note the limitations of reported appellate decisions as learning tools in this field see: C. Menkel-Meadow, 'Telling stories in school: Using case studies and stories to teach legal ethics' (2000) 69 *Fordham Law Review* 788 and B. Green, 'There but for fortune: Real-life vs fictional "case studies" in legal ethics' (2000) 69 *Fordham Law Review* 987. Green suggests that a fuller more 'fleshed out' version of appellate cases may be more desirable, but there are few examples of these.

T. Floyd and J. Gallagher 'Legal ethics, narrative and professional identity: The story of David Spaulding' (2008) 59 *Mercer Law Review* 941

R. Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings*, (Oxford University Press, 2008)

⁶⁷⁸ *Walmsley v. Cosentino* (2001) NSWCA 403

⁶⁷⁹ *ibid*

period, and then subsequently failing to inform the client to seek independent advice by a certain date regarding a possible claim against himself - it is legal authority for the proposition that: 'where a solicitor has failed to file proceedings in time, the solicitor will be in breach of his or her tortious duty of care to the client if the solicitor fails to tell the client not only that the client may have a cause of action against the solicitor and should seek independent advice, but also the date before which the client must seek that independent advice if they are to preserve their legal rights.'⁶⁸⁰ What began as an apparently simple case took twenty one years to be resolved and raises many interesting issues about the ethical responsibilities of the legal professionals involved and the nature of the thick concepts NEGLIGENCE and DUTY OF CARE.

The case involved a number of legal professionals as Walmsley the solicitor briefed six barristers, yet the court never considered whether the barristers had been negligent, even though they all appeared to be aware of Walmsley's negligence and conflict of interest and failed to warn or protect the client. Haller argues that reflecting upon the behaviour of the legal professionals involved in this case, demonstrates an 'inability or disinclination to see ethical issues, exercise ethical judgment or "rock the boat" when tasks and information are divided among a number of individuals in a work team who also rely on each other for future patronage and financial reward.'⁶⁸¹ This provides students with the opportunity to reflect upon the conduct of the particular legal professionals employed within this case, and the ethical dispositions (or the legal virtues as Domeslaar, Wang and Solum argue) that lawyers should exhibit, which as I have already suggested requires knowledge of thick legal concepts.

The case also provides a valuable vehicle through which to explore the ethical implications of a divided legal profession and consider why none of the barristers took responsibility for the clients welfare. Wooley notes:

Courts continue to emphasise that a barrister is only expected to advise 'as instructed'; the instructing solicitor is the primary arbiter as to whether the barrister has discharged his or her obligations, and it is

⁶⁸⁰ see note 675 at 193

⁶⁸¹ *ibid* at 196

See also: C. Parker, A. Evans, L. Haller, S. Le Mire and R. Mortensen, 'The ethical infrastructure of legal practice in larger law firms: Values, policy and behaviour' (2008) 31 *University of South Wales Law Journal* 163

usually the responsibility of the instructing solicitor not the barrister to ensure the client understands their rights and obligations.⁶⁸²

Considering the distance between the barristers and client it is hardly surprising they felt a lack of responsibility towards the client. This case gives students a chance to consider the nature of the relationship between barristers and instructing solicitors and the tensions that can arise within this relationship, for example the barrister is reliant on the instructing solicitor for future work and like many other work teams the barrister may not wish to question the work of the solicitor on their team. Although none of the legal professionals faced criticism from the court, the New South Wales Bar rewrote its professional conduct rules to prevent future occurrences like this and place a clear professional obligation upon the barrister to act in similar situations. The case therefore also highlights the lack of clear and consistent guidance available to lawyers regarding professional conduct as often the professional conduct rules and case law are in tension. This provides students with the opportunity to reflect upon their understanding of the legal professionals role, and the legal values that the legal professional is expected to possess and exhibit, this reflection will involve practical reasoning with thick concepts.⁶⁸³

Encouraging students to reflect upon the role of legal professionals within the legal system has become a key responsibility of legal education and legal educators, in light of the LETR and the recent changes within law (see chapter introduction). Tony King argues for a greater communication to potential lawyers regarding the nature and expectations of the legal profession (both the benefits and challenges faced by those working with the legal sector) he argues that it is an aspect of the legal educators role to try to objectively communicate this to law students.⁶⁸⁴ King also notes a need for better communication between teaching institutions and legal employers to ensure a better understanding of their respective needs, noting that communication is also an

⁶⁸² see note 675 at 196

⁶⁸³ Alice Wooley suggests thick concepts may be relevant to the discussion of legal virtues and their role within developing the moral character of legal professionals Alice Wooley, 'The Legitimate Concerns of Legal Ethics' 168

⁶⁸⁴ Tony King is the Director of the Clifford Chance Academy at the international law firm Clifford Chance LLP, after a period of practicing as a solicitor and teaching at the then College of Law, he has since been involved in education, training and professional development at Clifford Chance. See his paper: Tony King, 'The Future of Legal Education from the Profession's Viewpoint: a Brave New World?' in Hilary Sommerlad, Richard Young, Steven Vaughan and Sonia Harris-Short (eds), *The Futures of Legal Education and the Legal profession* (Hart Publishing, 2015), 181-200

essential part of ensuring continuing competence with the profession.⁶⁸⁵ Legal ethics has previously been shaped by the closed nature of the legal profession and Richard Able argues that law schools have often been complicit in fostering a notion of ‘legal professionalism’ that seeks to not only control how many could enter the profession, but also ‘who’ could enter the profession, because they teach students to ‘argue both sides of every case, approach law positivistically, as a set of constraints to be manipulated or evaded, followed grudgingly, only as required by the letter of the law, not by its spirit.’⁶⁸⁶ Better understanding the nature of legal values is important to legal education, because it is one area where the ethical dispositions of the legal system can be directly influenced through the ethical values that are fostered by the teaching process. Legal education instills a set of legal values within students and fosters a certain ideology (even if this is at a subconscious level that students are unaware of), both of which can be consciously engineered by those individuals responsible for designing the legal curriculum. This is one reason why consciously engineering and reflecting upon the legal curriculum can be both beneficial and important for the future of the legal profession and legal education; especially as all aspects of the legal profession are connected (legal practice, legal education, legal ethics, legal regulation and legal research). The meta-ethical literature on thick and thin concepts offers interesting insights for the discussion of legal values, insights that can be drawn upon in developing a better understanding of legal values, which is important as these underpin the legal ideology and ethos fostered by legal education (the legal curriculum is a reflection of the laws values and ideology).

5 – Conclusion.

This chapter has argued that in light of the transformation that the legal profession is currently undergoing, now is the time to consider reforming the legal curriculum in a manner that reflects the relevance of thick and thin concepts within legal education, which is hardly surprising considering their use and usefulness within law, as

⁶⁸⁵ Julian Webb also noted this problematic aspect of the legal set up: ‘the lack of established structures for effective engagement between the professions and the academy has been a recurrent complaint of every review of legal education in England and Wales since 1934.’ See note 589 at 18. The LETR suggested the establishment of a ‘Legal Education Council’ to achieve such a dialogue, although as yet this remains to be instigated.

⁶⁸⁶ Richard L Able, ‘What Does and Should Influence the Number of Lawyers?’ (2012) 19 *International Journal of the Legal Profession* 131, 187

demonstrated by my investigation. Changes within the legal profession exert pressure on the legal education structures that help to shape the legal profession and much of this pressure can be seen in terms of the changing legal curriculum and the changing ideology that can be seen reflected in both the legal profession and legal education.⁶⁸⁷

This chapter has presented a brief survey of opinions from those involved with this lively debate regarding the future of the legal profession and legal education many of the issues are related to or draw upon issues from legal ethics, and whilst these issues seem unlikely to be resolved at present due to the many diametrically opposed viewpoints, it seems clear that the issue of legal ethics will remain an important aspect of the debate regarding the legal curriculum.⁶⁸⁸ The literature on thick and thin concepts can both add to the existing debate and provide new ideas or opportunities for dialogue, the literature can therefore be useful for legal education even if it does not resolve the disagreements regarding the future of legal education (I admit that whilst thick and thin are useful for law they are unlikely to resolve such deeply entrenched philosophical disputes).

At present the future of the legal profession and legal education are unclear as the effects of the recent transformation of the legal system are yet to be fully realised or understood; and the legal system and profession are both constantly evolving. The extent to which thick and thin concepts within law could be useful to legal education will to a certain extent be dependent upon important decisions regarding the legal curriculum (in particular legal ethics) that are yet to be made. Despite this as long as legal values continue to play a role in both the legal profession and legal education then thick and thin concepts can be useful within legal education. This chapter has demonstrated that these terms are useful and relevant within legal education in relation to legal ethics, the legal curriculum, and the case-method of teaching; and this chapter therefore further supports my thesis that these terms are useful within law.

⁶⁸⁷ For example McGill University has adopted a unique program of legal study that integrates transnational legal perspectives into the legal curriculum, which ensures that students graduate with degrees in both civil and common law. See: Rosalie Jukier, 'Transnationalizing the Legal Curriculum: How to Teach What We Live' (2006) 56 *Journal of Legal Education* 172

⁶⁸⁸ Russell Pearce goes further than this and places legal ethics at the centre of the legal curriculum, in which case thick and thin concepts may also be of central importance. See: Russell G. Pearce, 'Legal Ethics Must Be the Heart of the Law School Curriculum' (2002) 26 *Journal of the Legal Profession* 159

Chapter Nine: Conclusion

This thesis set out with a single aim: to argue for the use and usefulness of thick and thin concepts within law. The criteria employed in this thesis to determine usefulness were not particularly technical, as my method was simply to show the benefit found in the use of the distinction in relation to a series of persistent problems or standing concerns within the frame of legal theory, legal understanding and legal practice. It is now possible to draw together the main elements of the argument pursued throughout the study and to demonstrate to what extent my thesis aim has been met. Before these concluding remarks commence it is useful to elaborate upon the method and arguments this investigation has pursued, one final time.

It has been an intended and major strength of my thesis to collate the many disparate instances of the use of thick and thin across a number of sub-disciplines within law. My thesis is one of the first significant attempts at an overarching conspectus of thick and thin within law, which has been undertaken with the aim of demonstrating that we are at a point of major change within analysis. The popularity and reach of the distinction between thick and thin concepts is increasing rapidly and my thesis argues for the importance of this distinction within law, an area where this distinction is yet to receive widespread acknowledgement. It is through my extensive research into the many disparate uses of thick and thin within law that I have observed a lack of clarity within the legal literature concerning both the nature of the distinction and the accompanying meta-ethical literature, this is hardly surprising in light of the relatively recent emergence of these ideas within legal analysis.

It is therefore important to begin with the following caveat: that whilst this thesis argues for the use and usefulness of thick and thin concepts within law, any claims regarding their potential are hampered to a certain extent by the quality of their current deployment by legal philosophers and other scholars within law. For these terms to prove useful within law our current legal use needs sharpening and these terms need to be deployed in a more consistent manner, and so it has therefore been important in terms of the credibility of my thesis to argue that if these terms are to achieve their full potential within law their use by legal philosophers needs to be rendered more precise (chapters five through seven highlighted weaknesses within the legal literature). Only after improving understanding and deployment of these terms will there be significant jurisprudential pay-offs.

The jurisprudential pay-offs that could follow from a consistently sharper and more precise use of thick and thin concepts within law could impact upon many different aspects of the law. In brief sum, and as a reminder of my claims, these benefits will include new and helpful ways of understanding existing difficulties and the generation of new and profitable avenues for research study and discussion, but also extend to the claim that awareness of the distinction creates the opportunity for a radical remodelling of how we understand law and come to build knowledge and expertise within legal practice. Many of the persistent legal issues that the distinction between thick and thin concepts can usefully help illuminate (and perhaps, resolve), also persistently present within philosophy as long-reigning philosophical problems.

If sound, one of the main strengths of this thesis is that thick and thin concepts are relevant to many different aspects of law: they can reignite traditional jurisprudential debates (the literature on thick and thin concepts within law is one of the first genuine invigorations of the debates surrounding law and morality since the 1950's); and contribute to contemporary legal issues (as demonstrated by the attention this study places on legal education). It is the relevance of thick and thin concepts to many different aspects of law that has led to the many disparate localised uses of thickness (such as those noted within chapters five through eight), therefore a significant value of my thesis stems from the overarching conspectus of these different inevitably local uses of thickness that I provide. This conspectus not only demonstrates the reach and power of my thesis, but it also responds to the needs of thick scholars. A lot of the detailed work excavating the research literature and its interconnections and similarities to other work in the relevant area is contained in my compendious footnotes, it is therefore an important aspect of my thesis that my footnotes are not a supplement or bibliographical reference point only.

Legal education has been an important aspect of this study because it unifies the relevance of thick and thin for many disparate topics within law (addressed in chapters five through seven) and unites the traditional and contemporary jurisprudential concerns addressed in this study. Legal education is at the forefront of any changes within the law and can both instigate legal change and respond to changes made to the legal system. Although legal education is not addressed until chapter eight of this thesis, this chapter is drawing upon the earlier discussion of thick and thin in law and

unites the theoretical implications of my thesis with the practical implications of pursuing thick and thin concepts within law.

The current legal application of thick and thin concepts within philosophy of law covers a number of separate but related legal concerns, and it has not been the intention of this investigation to provide detailed coverage of all these potential areas for research (although chapter five does go part way towards establishing the current extent of their legal application). Chapters five through seven have instead focused on those aspects of their current application within philosophy of law that can best demonstrate the scope of these terms and their relevance to long-reigning debates and key concerns within jurisprudence. Through an investigation of their relevance for legal positivism (chapter six) this study ensures the relevance of these terms for one of the most important and enduring legal theories, indeed this is the legal theory that continues to hold its position as the operative legal theory of the English Legal System. Chapter seven moves away from legal positivism towards general jurisprudence noting the wider jurisprudential uses of these terms by seminal legal philosophers, which furthers the credibility of this thesis and demonstrates the importance of these ideas for contemporary jurisprudence.

Throughout chapters five through seven I highlight some examples of thick concepts, particularly thick concepts that have been deployed within legal cases to demonstrate the benefit of the distinction between thick and thin concepts within law. These examples are brief and can be in light of the groundwork undertaken in my early chapters, because my intention is merely to demonstrate the existence of thickness within law, particularly case law, and the importance of recognising thickness because doing so brings to attention key jurisprudential questions that have wider significance, such as the distinction between facts and values which is central to the debate between separationists and non-separationists within the thick-thin literature. The distinction between thick and thin concepts therefore has significant implications for our general theories of law, such as legal positivism (as I demonstrate in chapter six) and natural law theory, which can be brought to life in every single case that deploys thick concepts.

By demonstrating the use and usefulness of thick and thin concepts in relation to two dissimilar topics within law (philosophy of law addressed in chapters five through

seven and legal education addressed in chapter eight) this study offers a more robust and comprehensive demonstration of the value of the distinction than would have been possible had my focus remained bound to a single focus or area of potential application. This enables my thesis to demonstrate the wider scope and benefit of these terms (thick and thin concepts), and ensures the strength of my single thesis: that thick and thin concepts are useful within law.

The specific conclusions of the enquiry can be stated simply. Thick and thin concepts are useful within law (in relation to many different aspects of law), they can enrich our understanding of both traditional and contemporary legal issues, they can help generate interesting new avenues for research study and discussion, and offer a new way (a new approach and terminology) to address legal issues; but as this investigation of their usefulness has demonstrated there are a number of problems with their current legal use. The literature on thick and thin legal concepts whilst still in its infancy suffers from a lack of clarity - the terms are often applied inconsistently and understood imprecisely – and this results in a number of ambiguities in both the legal application of these terms and the understanding demonstrated by legal philosophers working with the terms (particularly of their meta-ethical heritage). Whilst this investigation has never intended to dictate how these terms should be understood and applied by legal theorists, it has been an important part of this investigation and indeed my thesis, to recognise the current problems associated with the legal use of these terms, because future research in this field and any potential jurisprudential payoffs will be dependent upon improving the legal understanding and use of thick and thin concepts. One of the significant values of my thesis therefore lies in its recognition that you cannot invoke thickness in a casual or slight way, because the invocation of thickness (as I show in my early chapters) carries with it philosophical, metaphysical and ethical commitments seen in the divisions amongst philosophers who use the distinction between thick and thin, which are then likely to appear in the legal scholarship in question. Their appearance may be inadvertent and haphazard at present, but this only adds strength and value to my thesis for recognising that the invocation or deployment of the distinction between thick and thin within law, brings with it a need to clarify the philosophical commitments that are necessarily entailed by its use. I take no stance in my thesis, at any point, regarding which version of the distinction ought to be adopted (as this would also carry with it deeper philosophical, metaphysical and ethical commitments), instead my argument is wider and urges legal theorists operating with

this distinction to pay closer attention to the meta-ethical literature and develop an understanding of the many divisions within this literature. Once our understanding and use of thick and thin concepts is improved then the full potential of these terms (within law) can be realised. This could ultimately culminate in a greater awareness of how we understand law and come to build legal knowledge and expertise within legal practice, potentially offering the opportunity for radically remodelling our approaches to legal practice.

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